700SC. Special Circumstances: Introduction

If you find (the/a) defendant guilty of first degree murder, you must also decide if the People have proved that [one or more of] the special circumstance[s] (is/are) true.

In order for you to return a finding that a special circumstance is or is not true, all 12 of you must agree.

The People have the burden of proving (the/each) special circumstance beyond a reasonable doubt. If the People have not met this burden, you must find the special circumstance has not been proved.

You have been given [a] verdict form[s] on which you must state whether you find (the/each) special circumstance has been proved true or not true [for each defendant]. [You must return a verdict form stating true or not true for each special circumstance on which you all agree.]

[You must (consider each special circumstance separately/ [and you must] consider each special circumstance separately for each defendant).]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the special circumstances and to instruct that, in the case of a reasonable doubt, the jury must find the special circumstance not true. (Pen. Code, § 190.4; see *People v. Frierson* (1979) 25 Cal.3d 142, 180; *People v. Ochoa* (1998) 19 Cal.4th 353, 420.)

The court has a **sua sponte** duty to instruct the jury to consider each special circumstance separately. (See *People v. Holt* (1997) 15 Cal.4th 619, 681.) Give the bracketed paragraph if more than one special circumstance is charged or there are multiple defendants.

Where multiple special circumstances are charged, the court may accept a partial verdict if the jury is unable to unanimously agree on all of the special circumstances. (Pen. Code, § 190.4.)

AUTHORITY

Reasonable Doubt ‣ Pen. Code, § 190.4; *People v. Frierson* (1979) 25 Cal.3d 142, 180; *People v. Ochoa* (1998) 19 Cal.4th 353, 420.

Partial Verdict ‣ Pen. Code, § 190.4.

Consider Each Special Circumstance Separately ‣ *People v. Holt* (1997) 15 Cal.4th 619, 681.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 461.

RELATED ISSUES

Right to Jury Trial on Special Circumstances

Unless specifically waived, the defendant has a right to jury trial on the special circumstance allegations even if the defendant pleaded guilty to the underlying charges. (*People v. Granger* (1980) 105 Cal.App.3d 422, 428.)

Prior Conviction for Murder Requires Bifurcated Trial

If the defendant is charged with the special circumstance of a prior conviction for murder, under Penal Code section 190.2(a)(2), the court must bifurcate the trial. (Pen. Code, § 190.1.) The jury should first determine whether the defendant is guilty of first degree murder and whether any other special circumstances charged are true. *(Ibid.)* The prior conviction special circumstance should then be submitted to the jury in a separate proceeding. *(Ibid.)*

All Special Circumstances Constitutional Except Heinous or Atrocious Murder

The special circumstance for a heinous, atrocious, or cruel murder (Pen. Code, § 190.2(a)(14)) has been held to be unconstitutionally vague. (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803; *People v. Sanders* (1990) 51 Cal.3d 471, 520.) No other special circumstance has been found unconstitutional.

STAFF NOTES

Pen. Code, § 190.2:

(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.

(3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should

have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

(8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.

(9) The victim was a firefighter, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 if the Welfare and Institutions Code.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim by means of lying in wait.

(16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.

(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:

(A) Robbery in violation of Section 211 or 212.5.

(B) Kidnapping in violation of Section 207, 209, or 209.5.

(C) Rape in violation of Section 261.

(D) Sodomy in violation of Section 286.

(E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288.

(F) Oral copulation in violation of Section 288a.

(G) Burglary in the first or second degree in violation of Section 460.

(H) Arson in violation of subdivision (b) of Section 451.

(I) Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

(L) Carjacking, as defined in Section 215.

(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

(18) The murder was intentional and involved the infliction of torture.

(19) The defendant intentionally killed the victim by the administration of poison.

(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.

(22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state

prison for life without the possibility of parole.

(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

The penalty shall be determined as provided in this section and Sections 190.1, 190.3, 190.4, and 190.5.

Pen. Code, § 190.4(a):

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

Pen Code, § 190.1, in relevant part:

A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of

murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

701SC. Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990

If you decide that (the/a) defendant is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), then, when you consider the special circumstance[s], you must also decide whether the defendant acted with the intent to kill.

In order to prove (the/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), the People must prove that the defendant acted with the intent that _____ <*insert name[s] or description[s] of decedent[s]*> **be killed.**

[The People do not have to prove that the actual killer acted with the intent to kill in order for the special circumstance[s] of _____ <*insert special circumstance[s] without intent requirement*> **to be true.]**

[If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find the special circumstance[s] true, you must find that the defendant acted with the intent that _____ <*insert name[s] or description[s] of decedent[s]*> **be killed.]**

The People have the burden of proving beyond a reasonable doubt that (the defendant/_____ <*insert name of defendant*>) **acted with the intent that _____** <*insert name[s] or description[s] of decedent[s]*> **be killed. If the People have not met this burden, you must find (the/these) special circumstance[s] (has/have) not been proved true [for (him/her)].**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is sufficient evidence to support the finding that the defendant was not the actual killer. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117.)

For all murders committed prior to June 6, 1990, the People must prove that an aider and abettor or coconspirator acted with intent to kill for all special circumstances except under Penal Code section 190.2(a)(2) (prior conviction for murder). (*People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [modifying *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135]; see pre-June 6, 1990, Pen. Code, § 190.2(b).) Since the Supreme Court ruling in *People v. Anderson*, *supra*, the People do not have to show intent to kill on the part of the actual killer unless specified in the special circumstance. (*People v. Anderson, supra,* 43 Cal.3d at p. 1147.) However, if the killing occurred during the window of time between *Carlos* and *Anderson* (1983 to 1987), then the People must also prove intent to kill on the part of the actual killer. (*People v. Bolden* (2002) 29 Cal.4th 515, 560.)

Use this instruction for any case in which the defendant is alleged to be an accomplice to a homicide that occurred prior to June 6, 1990, where any special circumstance other than one under Penal Code section 190.2(a)(2) is charged.

Give the bracketed paragraph stating that the People do not have to prove intent to kill on the part of the actual killer if there is a codefendant alleged to be the actual killer or if the jury could convict the defendant as either the actual killer or an accomplice, but only if the special circumstance charged does not require intent to kill as an element. The court should carefully review the prior versions of Penal Code section 190.2 to determine if the special circumstance required intent to kill at the time of the killing because the special circumstances have been amended by referendum several times.

If there is sufficient evidence to show that the defendant may have been an accomplice and not the actual killer, the court has a **sua sponte** duty to give the accomplice intent instruction, regardless of the prosecution's theory of the case. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117.) If the jury could convict the defendant either as a principal or as an accomplice, and the defendant is charged with a special circumstance that does not require intent to kill by the principal, then jury must find intent to kill if they cannot agree that the defendant was the actual killer. *(Ibid.)* In such cases, the court should then give both bracketed paragraphs.

If the homicide occurred between 1983 and 1987, do not give either bracketed paragraph. (*People v. Bolden* (2002) 29 Cal.4th 515, 560.)

In the final paragraph, insert the name of the defendant rather than the term "defendant" if there is a codefendant alleged to be the actual killer and use the final bracketed phrase "for (him/her)."

Do not give this instruction if accomplice liability is not at issue in the case. The required mental state, if any, is stated in the instruction for each special circumstance.

Related Instructions

Instruction 702SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder

Instruction 703SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)

AUTHORITY

Accomplice Intent Requirement ▸ Pre-June 6, 1990, Pen. Code, § 190.2(b); *People v. Anderson* (1987) 43 Cal.3d 1104, 1147.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 453, 460.

STAFF NOTES

Pre June 6, 1990, Pen Code § 190.2(b) (in relevant part):

> Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

Sufficient Evidence to Support Accomplice Liability

> Where [. . .] there was evidence from which a jury could have based its verdict on an accomplice theory, the court erred in failing to instruct that the jury must find that defendant intended to aid another in the killing of a human being.

(*People v. Jones* (2003) 30 Cal.4th 1084, 1117 [citations and quotation marks omitted].)

702SC. Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder

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If you decide that (the/a) defendant is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), then, when you consider the special circumstance[s] of _____ *<insert special circumstance[s] other than felony murder>***, you must also decide whether the defendant acted with the intent to kill.**

In order to prove (the/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), the People must prove that the defendant acted with the intent that _____ *<insert name[s] or description[s] of decedent[s]>* **be killed.**

[The People do not have to prove that the actual killer acted with the intent to kill in order for the special circumstance[s] of _____ *<insert only special circumstance[s] under Pen. Code, §§ 190.2(a)(2), (3), (4), (5) or (6)>* **to be true.]**

[If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find the special circumstance[s] of _____ *<insert only special circumstance[s] under Pen. Code, §§ 190.2(a)(2), (3), (4), (5) or (6)>* **true, you must find that the defendant acted with the intent that _____** *<insert name[s] or description[s] of decedent[s]>* **be killed.]**

The People have the burden of proving beyond a reasonable doubt that (the defendant/_____ *<insert name of defendant>***) acted with the intent that _____** *<insert name[s] or description[s] of decedent[s]>* **be killed. If the People have not met this burden, you must find (the/these) special circumstance[s] (has/have) not been proved true [for (him/her)].**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is

sufficient evidence to support the finding that the defendant was not the actual killer. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117.)

Proposition 115 modified the intent requirement of the special circumstance law, codifying the decisions of *People v. Anderson* (1987) 43 Cal.3d 1104, 1147, and *Tison v. Arizona* (1987) 481 U.S. 137, 157–158. The current law provides that the actual killer does not have to act with intent to kill unless the special circumstance specifically requires intent. (Pen. Code, § 190.2(b).) A defendant who is not the actual killer must act with intent to kill unless the felony-murder special circumstance is charged. (Pen. Code, §§ 190.2(c), (d).) If the felony-murder special circumstance is charged, then the People must prove that a defendant who was not the actual killer was a major participant and acted with reckless indifference to human life. (Pen. Code, § 190.2(d); *People v. Estrada* (1995) 11 Cal.4th 568, 571.)

For all special circumstances except felony murder, use this instruction for any case in which the defendant is alleged to be an accomplice to a homicide that occurred after June 5, 1990. When the felony-murder special circumstance is charged, use Instruction 703SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).

Give the bracketed paragraph stating that the People do not have to prove intent to kill on the part of the actual killer if there is a codefendant alleged to be the actual killer or if the jury could convict the defendant as either the actual killer or an accomplice, but only if one of the five special circumstances listed in Penal Code section 190.2(a)(2)–(6) is charged. These are the only special circumstances, other than felony murder, that do not require intent to kill by the actual killer. The five special circumstances are prior conviction for murder (§ 190.2(a)(2)), multiple offenses of murder (§ 190.2(a)(3)), murder by hidden explosive (§ 190.2(a)(4)), murder to avoid arrest (§ 190.2(a)(5)), and murder by mail bomb (§ 190.2(a)(6)).

If there is sufficient evidence to show that the defendant may have been an accomplice and not the actual killer, the court has a **sua sponte** duty to give the accomplice intent instruction, regardless of the prosecution's theory of the case. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117.) If the jury could convict the defendant either as a principal or as an accomplice, and the defendant is charged with one of the special circumstances that does not require intent to kill by the principal, then jury must find intent to kill if they cannot agree that the defendant was the actual killer. *(Ibid.)* In such cases, the court should then give both bracketed paragraphs.

In the final paragraph, insert the name of the defendant rather than the term "defendant" if there is a codefendant alleged to be the actual killer and use the final bracketed phrase "for (him/her)."

Do not give this instruction if accomplice liability is not at issue in the case. The required mental state, if any, is stated in the instruction for each special circumstance.

Related Instructions
Instruction 701SC, Special Circumstances: Intent Requirement for Accomplice Before June 6, 1990
Instruction 703SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)

AUTHORITY

Accomplice Intent Requirement ▸ Pen. Code, § 190.2(c).
Constitutional Standard for Intent by Accomplice ▸ *Tison v. Arizona* (1987) 481 U.S. 137, 157–158.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 453, 460.

STAFF NOTES

Pen. Code, § 190.2 (in relevant part):

> (b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.
>
> (c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

Sufficient Evidence to Support Accomplice Liability

> Where [. . .] there was evidence from which a jury could have based its verdict on an accomplice theory, the court erred in failing to instruct that the jury must find that defendant intended to aid another in the killing of a human being.

(*People v. Jones* (2003) 30 Cal.4th 1084, 1117 [citations and quotation marks omitted].)

703SC. Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17)

If you decide that (the/a) defendant is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), then, when you consider the special circumstance[s] of _____ <*insert felony murder special circumstance[s]*>**, you must also decide whether the defendant acted with reckless indifference to human life.**

In order to prove (the/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder as (an aider and abettor/ [or] a member of a conspiracy), the People must prove that:

1. **The defendant was a major participant in the crime.**

AND

2. **When the defendant participated, (he/she) acted with reckless indifference to human life.**

[A person *acts with reckless indifference to human life* when:

1. **He or she knowingly engages in criminal activity.**

2. **He or she knows that activity involves a grave risk of death.**

AND

3. **He or she acts with conscious disregard for the danger to human life.]**

[The People do not have to prove that the actual killer acted with reckless indifference to human life in order for the special circumstance[s] of _____ <*insert felony-murder special circumstance[s]*> **to be true.]**

[If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find the special circumstance[s] true, you must find that the defendant acted with reckless indifference to human life and was a major participant in the crime.]

The People have the burden of proving beyond a reasonable doubt that (the defendant/_____ <*insert name of defendant*>) acted with reckless indifference to human life and was a major participant in the crime. If the People have not met this burden, you must find (the/these) special circumstance[s] (has/have) not been proved true [for (him/her)].

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is sufficient evidence to support the finding that the defendant was not the actual killer. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1117.)

Proposition 115 modified the intent requirement of the special circumstance law, codifying the decisions of *People v. Anderson* (1987) 43 Cal.3d 1104, 1147, and *Tison v. Arizona* (1987) 481 U.S. 137, 157–158. The current law provides that the actual killer does not have to act with intent to kill unless the special circumstance specifically requires intent. (Pen. Code, § 190.2(b).) If the felony-murder special circumstance is charged, then the People must prove that a defendant who was not the actual killer was a major participant and acted with reckless indifference to human life. (Pen. Code, § 190.2(d); *People v. Estrada* (1995) 11 Cal.4th 568, 571.)

Use this instruction for any case in which the defendant is alleged to be an accomplice to a killing that occurred after June 5, 1990, when the felony-murder special circumstance is charged.

Give the bracketed paragraph stating that the People do not have to prove reckless indifference on the part of the actual killer if there is a codefendant alleged to be the actual killer or if the jury could convict the defendant as either the actual killer or an accomplice.

If there is sufficient evidence to show that the defendant may have been an accomplice and not the actual killer, the court has a **sua sponte** duty to give the accomplice intent instruction, regardless of the prosecution's theory of the case. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117.) If the jury could convict the defendant either as a principal or as an accomplice, jury must find reckless indifference if they cannot agree that the defendant was the actual killer. *(Ibid.)* In such cases, the court should give both the bracketed paragraph stating that the

People do not have to prove reckless indifference on the part of the actual killer and the bracketed paragraph beginning, "If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer . . . ."

The court does not have a sua sponte duty to define "reckless indifference to human life." (*People v. Estrada* (1995) 11 Cal.4th 568, 578.) However, this "holding should not be understood to discourage trial courts from amplifying the statutory language for the jury." (*Id*. at p. 579.) The court may give the bracketed definition of reckless indifference if requested.

In the final paragraph, insert the name of the defendant rather than the term "defendant" if there is a codefendant alleged to be the actual killer and use the final bracketed phrase "for (him/her)."

Do not give this instruction if accomplice liability is not at issue in the case.

AUTHORITY

Accomplice Intent Requirement, Felony Murder ▸ Pen. Code, § 190.2(d).
Reckless Indifference to Human Life ▸ *People v. Estrada* (1995) 11 Cal.4th 568, 578; *Tison v. Arizona* (1987) 481 U.S. 137, 157–158.
Constitutional Standard for Intent by Accomplice ▸ *Tison v. Arizona* (1987) 481 U.S. 137, 157–158.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, §§ 453, 460.

STAFF NOTES

Pen. Code, § 190.2 (in relevant part):

> (d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

Definition of "Reckless Indifference"

The court does not have a sua sponte duty to define "reckless indifference. (*People v. Estrada* (1995) 11 Cal.4th 568, 578.) However, in reaching this holding, the court stated,

> Although we conclude that the trial court does not have a sua sponte duty to further amplify "reckless indifference to human life," [. . .] our holding should not be understood to discourage trial courts from amplifying the statutory language for the jury.

(*Id.* at p. 579.)

> The question remains what language should replace the standard instruction's present reference to an "extreme likelihood" of risk. [. . .] [W]e believe that, in the event the request for a clarifying instruction is granted, the jury should be instructed in the language of [*Tison v. Arizona* (1987) 481 U.S. 137, 157-158]. Although the high court provided several descriptions of the requisite mental state throughout its opinion, we think it prudent to instruct according to the rule set forth in the holding of that case, i.e., "that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." (*Tison, supra*, 481 U.S. at pp. 157-158.)

> Thus, we find that in the event a request for clarification of the phrase "reckless indifference to human life" is granted, the present reference in CALJIC No. 8.80.1 to an "extreme likelihood" of risk to innocent life should be replaced with the language from *Tison* concerning a "grave" risk of death.

(*Id.*at p. 580.)

Sufficient Evidence to Support Accomplice Liability

> Where [. . .] there was evidence from which a jury could have based its verdict on an accomplice theory, the court erred in failing to instruct that the jury must find that defendant intended to aid another in the killing of a human being.

(*People v. Jones* (2003) 30 Cal.4th 1084, 1117 [citations and quotation marks omitted].)

704SC. Special Circumstances: Circumstantial Evidence

Both direct and circumstantial evidence are acceptable ways of proving that a special circumstance allegation is true. Neither type of evidence is necessarily more reliable than the other. You must decide whether a special circumstance has been proved in light of all the evidence.

Before you rely on circumstantial evidence to conclude that a special circumstance allegation is true:

1. **You must be convinced that the People have proved each fact essential to that conclusion.**

AND

2. **You must also decide whether, in light of all of the evidence, the only reasonable conclusion supported by the circumstantial evidence is that the special circumstance allegation is true.**

Also, if you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the special circumstance allegation is true and another reasonable conclusion supports a finding that it is not true, you must conclude that that the allegation was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable. In reaching your conclusion, you should evaluate all of the evidence presented to you.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [duty exists where circumstantial evidence relied on to prove any element, including intent]; *People v. Boyd* (1987) 43 Cal.3d 333, 351–352.)

The Supreme Court has held that it is appropriate to give an instruction specifically tailored to the use of circumstantial evidence in determining the truth of a special circumstance allegation. (*People v. Maury* (2003) 30 Cal.4th 342, 428; *People v. Hughes* (2002) 27 Cal.4th 287, 346; *People v. Lewis* (2001) 25 Cal.4th 610, 653.) However, the court is not *required* to give this instruction if it has also given the more general instruction on circumstantial evidence. (*People v. Hines* (1997) 15 Cal.4th 997, 1051; *People v. Lewis, supra,* 25 Cal.4th at p. 653; see Instruction 300, Circumstantial Evidence.)

Related Instructions
Instruction 300, Circumstantial Evidence.
Instruction 301, Circumstantial Evidence: Intent or Mental State.
Instruction 705SC, Special Circumstances: Circumstantial Evidence—Intent or Mental State.

AUTHORITY

Duty to Instruct on Circumstantial Evidence Generally ‣ *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Boyd* (1987) 43 Cal.3d 333, 351–352.

Appropriate to Instruct on Special Circumstance ‣ *People v. Maury* (2003) 30 Cal.4th 342, 428; *People v. Hughes* (2002) 27 Cal.4th 287, 346; *People v. Lewis* (2001) 25 Cal.4th 610, 653.

Instruction Duplicative, Not Required ‣ *People v. Lewis* (2001) 25 Cal.4th 610, 653; *People v. Hines* (1997) 15 Cal.4th 997, 1051.

STAFF NOTES

Instruction Appropriate But Not Required

> The trial court instructed the jury in the language of CALJIC No. 2.02, on the sufficiency of circumstantial evidence to specific intent, and CALJIC No. 8.83, on the sufficiency of circumstantial evidence to prove a special circumstance generally.
>
> Defendant faults the trial court for giving CALJIC No. 8.83 rather than a related instruction, CALJIC No. 8.83.1, on the sufficiency of circumstantial evidence to prove the specific intent necessary to prove a special circumstance. He argues that because the prosecution's evidence in support of the special circumstance allegation on this point was entirely circumstantial, the trial court was required to give the more specific CALJIC No. 8.83.1 rather than the more general CALJIC No. 8.83.
>
> Although CALJIC No. 8.83.1 would have been an appropriate instruction in this case, it was not required. As we explained in *People v. Hines* (1997) 15 Cal.4th 997, both CALJIC Nos. 8.83 and 8.83.1 are duplicative of a more general instruction, CALJIC No. 2.01, informing the jury how to consider circumstantial evidence to prove guilt, and a trial court does not err in refusing to give the pattern instructions pertaining more specifically to proof of special circumstance allegations on this basis. [. . .] Here, the trial court gave both CALJIC No. 3.31, on the required union between act and specific intent, and CALJIC No. 2.02, on the use of circumstantial evidence to prove specific intent generally. The court was not required to provide a repetitive instruction informing the jury, more specifically, how to evaluate circumstantial evidence of specific intent as it relates to proving the special circumstance allegations.

(*People v. Lewis* (2001) 25 Cal.4th 610, 653.)

Source

This instruction is based entirely on Task Force Instruction 300, Circumstantial Evidence. See Notes to that instruction.

705SC. Special Circumstances: Circumstantial Evidence—Intent or Mental State

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In order to prove the special circumstance[s] of _____ <*insert special circumstance[s] with intent requirement*>, the People must prove not only that the defendant did the act[s] charged, but also that (he/she) acted with a particular intent or mental state. The instruction[s] for (each/the) special circumstance[s] explain[s] the intent or mental state required.

An intent or mental state may be proved by circumstantial evidence.

Before you rely on circumstantial evidence to find that the defendant had the required intent or mental state:

1. **You must be convinced that the People have proved each fact essential to the conclusion that the defendant had the required intent or mental state.**

AND

2. **You must also decide whether, in light of all of the evidence, the only reasonable conclusion supported by the circumstantial evidence is that the defendant had that required intent or mental state.**

Also, if you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state and another reasonable conclusion supports a finding that the defendant did not have the required intent or mental state, you must conclude that the required intent or mental state was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable. In reaching your conclusion, you should evaluate all of the evidence presented to you.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on how to evaluate circumstantial evidence if the prosecution substantially relies on circumstantial evidence to

establish any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49 [duty exists where circumstantial evidence relied on to prove any element, including intent]; *People v. Boyd* (1987) 43 Cal.3d 333, 351–352.)

The Supreme Court has held that it is appropriate to give an instruction specifically tailored to the use of circumstantial evidence in determining the truth of a special circumstance allegation. (*People v. Maury* (2003) 30 Cal.4th 342, 428; *People v. Hughes* (2002) 27 Cal.4th 287, 346; *People v. Lewis* (2001) 25 Cal.4th 610, 653.) However, the court is not required to give this instruction if it has also given the more general instruction on circumstantial evidence. (*People v. Hines* (1997) 15 Cal.4th 997, 1051; *People v. Lewis, supra,* 25 Cal.4th at p. 653; see Instruction 301, Circumstantial Evidence: Intent or Mental State.)

If intent or mental state is the only element that rests substantially on circumstantial evidence, then this instruction should be given in place of Instruction 704SC, Special Circumstances: Circumstantial Evidence. (See *People v. Marshall* (1996) 13 Cal.4th 799, 849). If other elements of the offense also rest substantially or entirely on circumstantial evidence, the court may give the more general instruction, Instruction 704SC, instead of this instruction. (*People v. Hughes, supra,* 27 Cal.4th at p. 347.) The court may choose to give both instructions (Instructions 704SC and 705SC) and may also choose to give both circumstantial evidence instructions for non–special circumstance cases (Instructions 300 and 301). (See *People v. Maury, supra,* 30 Cal.4th at p. 428.)

Related Instructions
Instruction 300, Circumstantial Evidence.
Instruction 301, Circumstantial Evidence: Intent or Mental State.
Instruction 704SC, Special Circumstances: Circumstantial Evidence.

AUTHORITY

Duty to Instruct on Circumstantial Evidence Generally ▸ *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Boyd* (1987) 43 Cal.3d 333, 351–352.

Appropriate to Instruct on Special Circumstance ▸ *People v. Maury* (2003) 30 Cal.4th 342, 428; *People v. Hughes* (2002) 27 Cal.4th 287, 346; *People v. Lewis* (2001) 25 Cal.4th 610, 653.

Instruction Duplicative, Not Required ▸ *People v. Lewis* (2001) 25 Cal.4th 610, 653; *People v. Hines* (1997) 15 Cal.4th 997, 1051.

STAFF NOTES

Instruction Appropriate But Not Required

> The trial court instructed the jury in the language of CALJIC No. 2.02, on the sufficiency of circumstantial evidence to specific intent, and CALJIC No. 8.83, on the sufficiency of circumstantial evidence to prove a special circumstance generally.
>
> Defendant faults the trial court for giving CALJIC No. 8.83 rather than a related instruction, CALJIC No. 8.83.1, on the sufficiency of circumstantial evidence to prove the specific intent necessary to prove a special circumstance. He argues that because the prosecution's evidence in support of the special circumstance allegation on this point was entirely circumstantial, the trial court was required to give the more specific CALJIC No. 8.83.1 rather than the more general CALJIC No. 8.83.
>
> Although CALJIC No. 8.83.1 would have been an appropriate instruction in this case, it was not required. As we explained in *People v. Hines* (1997) 15 Cal.4th 997, both CALJIC Nos. 8.83 and 8.83.1 are duplicative of a more general instruction, CALJIC No. 2.01, informing the jury how to consider circumstantial evidence to prove guilt, and a trial court does not err in refusing to give the pattern instructions pertaining more specifically to proof of special circumstance allegations on this basis. [. . .] Here, the trial court gave both CALJIC No. 3.31, on the required union between act and specific intent, and CALJIC No. 2.02, on the use of circumstantial evidence to prove specific intent generally. The court was not required to provide a repetitive instruction informing the jury, more specifically, how to evaluate circumstantial evidence of specific intent as it relates to proving the special circumstance allegations.

(*People v. Lewis* (2001) 25 Cal.4th 610, 653.)

Source

This instruction is based entirely on Task Force Instruction 301, Circumstantial Evidence: Intent or Mental State. See Notes to that instruction.

When Instruction is Required

> Defendant contends the trial court erred in failing to instruct the jury, sua sponte, in the language of CALJIC No. 2.02, pertaining to the sufficiency of circumstantial evidence to prove the requisite mental state for premeditated and deliberate murder. As defendant acknowledges, however, the trial court instructed the jury with CALJIC No. 2.01, the more inclusive instruction on sufficiency of circumstantial evidence. Use of CALJIC No. 2.01, rather than 2.02, is proper unless the only element of the offense that rests substantially or entirely on circumstantial evidence is that of specific intent or mental state [citation]. Here, mental state was not the only element of the case resting on circumstantial evidence; consequently, the trial court did not err in reading the more inclusive instruction.

(*People v. Marshall* (1996) 13 Cal.4th 799, 849.)

706SC. Special Circumstances: Jury May Not Consider Punishment

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In your deliberations, you may not consider or discuss penalty or punishment in any way when deciding whether a special circumstance, or any other charge, has been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury not to consider penalty or punishment when deciding on the special circumstances or other charges. (*People v. Robertson* (1982) 33 Cal.3d 21, 36; *People v. Holt* (1984) 37 Cal.3d 436, 458 [jury may not consider punishment in deciding on special circumstances].)

AUTHORITY

Duty to Instruct ▸ *People v. Robertson* (1982) 33 Cal.3d 21, 36.
Jury May Not Consider Punishment ▸ *People v. Holt* (1984) 37 Cal.3d 436, 458.

707SC. Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice

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In order to prove the special circumstance[s] of _____ *<insert special circumstance[s] requiring proof of additional crime>***, the People must prove that the defendant committed _____** *<insert crime[s] (other than murder) that must be proved>***. The People have presented the testimony of _____** *<insert name[s] of witness[es]>* **on this issue.**

Because special rules apply to the testimony of [an] accomplice[s], you must decide whether _____ *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s].**

You may not find that the special circumstance[s] of _____ *<insert special circumstance[s] requiring proof of additional crime>* **(is/are) true based only on the testimony of an accomplice. You may use the testimony of an accomplice to find the special circumstance true only if:**

1. **The accomplice's testimony is supported by other evidence that you believe.**

2. **That supporting evidence is independent of the accomplice's testimony.**

AND

3. **That supporting evidence tends to connect the defendant to the commission of _____** *<insert crime[s] (other than murder) that must be proved>***.**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant committed _____ *<insert crime[s] (other than murder) that must be proved>***, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of _____** *<insert crime[s] (other than murder) that must be proved>***.**

Before you may consider the testimony of _____ *<insert name[s] of witness[es]>* **on the question of whether the special circumstance[s] (was/were) proved, you must decide whether (he/she/they) (was/were) [an] accomplice[s]. A person is an *accomplice* if he or she is subject to prosecution for the identical offense alleged against the defendant. A person is subject to prosecution if:**

1. **(He/She) knew of the criminal purpose of the person who committed the offense.**

AND

2. **(He/She) intended to, and did, in fact, (commit the offense[,]/ [or] aid, facilitate, promote, encourage, or instigate the commission of the offense [,]/ [or] participate in a criminal conspiracy to commit the offense).**

The burden is on the defendant to prove that it is more likely than not that _____ *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s].**

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime [will be committed or] is being committed and does nothing to stop it.]

[A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute (the person/those) who commit[s] that crime is not an accomplice.]

[You may not conclude that a child under 14 years old was an accomplice unless you also decide that when the child acted, (he/she) understood:

1. **The nature and effect of the criminal conduct.**

2. **That the conduct was wrongful and forbidden.**

AND

3. **That (he/she) could be punished for participating in the conduct.]**

[The evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice.]

Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in light of all the other evidence.

[This rule requiring supporting evidence also applies to accomplice statements made outside the courtroom (to _____ *<insert name>*/**on** _____ *<insert date>*/_____ *<insert other identification about out-of-court statement[s]>***).]**

If you decide that _____ *<insert name[s] of witness[es]>* **(was/were) not [an] accomplice[s], you should evaluate (his/her/their) testimony as you would that of any other witness.**

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct that testimony by an accomplice must be corroborated if that testimony is used to prove a special circumstance based on a crime other than the murder charged in the case. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1177.) "When the special circumstance requires proof of some other crime [besides the charged murder], that crime cannot be proved by the uncorroborated testimony of an accomplice. But when . . . it requires only proof of the motive for the murder for which defendant has already been convicted, the corroboration requirement . . . does not apply." *(Ibid.)*

Do not give this instruction if the witness is a confessing codefendant. Giving any accomplice instruction in a case where a codefendant has confessed could be tantamount to instructing that the defendant is guilty because he or she is an accomplice of an admittedly guilty person. (*People v. Hill* (1967) 66 Cal.2d 536, 555.)

When the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, give Instruction 708SC, Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice.

Give the bracketed paragraph beginning "A person who lacks criminal intent" when the evidence suggests that the witness did not share the defendant's specific criminal intent, e.g., witness is an undercover police officer or an unwitting assistant.

Give the bracketed paragraph beginning "You may not conclude that a child under 14 years old" on request if the defendant claims that a child witness's testimony must be corroborated because the child acted as an accomplice. (Pen. Code, § 26; *People v. Williams* (1936) 12 Cal.App.2d 207, 209.)

Give the final bracketed paragraph beginning "This rule requiring supporting evidence" on request when the corroboration rule is being applied to out-of-court statements. (See *People v. Andrews* (1989) 49 Cal.3d 200, 214.)

Related Instructions

Instruction 708SC, Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice.
Instruction 480, Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice.
Instruction 481, Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice.

AUTHORITY

Duty to Instruct ▸ Pen. Code, § 1111; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1177; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.
Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863.
Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569.
Defendant's Burden of Proof ▸ *People v. Belton* (1979) 23 Cal.3d 516, 523.
Defense Admissions May Provide Necessary Corroboration ▸ *People v. Williams* (1997) 16 Cal.4th 635, 680.
Definition of Accomplice as Aider and Abettor ▸ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.
Extent of Corroboration Required ▸ *People v. Szeto* (1981) 29 Cal.3d 20, 27.
One Accomplice May Not Corroborate Another ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15.
Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911.

Testimony of Feigned Accomplice Need Not Be Corroborated ‣ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193.

Uncorroborated Accomplice Testimony May Establish Corpus Delicti ‣ *People v. Williams* (1988) 45 Cal.3d 1268, 1317.

Witness an Accomplice as a Matter of Law ‣ *People v. Williams* (1997) 16 Cal.4th 635, 679.

3 Witkin& Epstein, Cal Evidence (4th ed. 2000) Presentation, § 98, p. 134 [wrongdoers who are not accomplices]; § 99, p. 136 [“accomplices” who appear to be victims]; § 105, p. 142.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 461.

STAFF NOTES

Pen. Code, § 1111:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Duty to Provide Instruction Regarding Special Circumstance

> The jury was instructed that a special circumstance cannot be based on the testimony of an accomplice unless it is corroborated by evidence "tending to connect such defendant with the commission of *the offense*." Defendant argues that the instruction should have read evidence "tending to connect defendant with the *special circumstance*," because evidence connecting him with the murder would not corroborate accomplice testimony on a special circumstance.
>
> Defendant relies on *People* v. *Varnum* (1967) 66 Cal.2d 808, 814-815, which held that in the penalty phase of a capital trial, the prosecution could not prove an aggravating offense by the uncorroborated testimony of an accomplice. *Varnum*, however, did not impose a general requirement of corroboration; it was limited to evidence showing crimes other than the one charged and proved in the guilt trial, and rested on the rule that evidence of such other crimes must meet the rules of admissibility governing proof of those crimes. [Citations.]
>
> Our treatment of the corpus delicti requirement in connection with special circumstances presents a close analogy. [. . .] We adopt the same distinction here. When the special circumstance requires proof of some other crime [besides the charged murder], that crime cannot be proved by the uncorroborated testimony of an accomplice. But when [. . .] it requires only proof of the motive for the murder for

> which defendant has already been convicted, the corroboration requirement [. . .] does not apply.

(*People v. Hamilton* (1989) 48 Cal.3d 1142, 1176-77.)

Source
This instruction is based on Instruction 480, Accomplice Testimony. See Notes to that Instruction. Notes to that Instruction follow here.

Definition of Accomplice
The Supreme Court relied on authority defining aiders and abettors in defining an accomplice:

> This . . . definition encompasses all principals to the crime (citations omitted), including aiders and abettors and coconspirators. (citations omitted.) . . . The fact that a witness has been charged or held to answer for the same crimes as the defendant and then has been granted immunity does not necessarily establish that he or she is an accomplice. Nor is an individual's presence at the scene of a crime or failure to prevent its commission sufficient to establish aiding and abetting. Indeed, as we explained in *People v. Beeman*, (citation omitted), 'the weight of authority and sound law requires proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of the offense. (citations omitted).

(*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.)

Burden of Proof

> In order to establish that an individual is an accomplice, a defendant bears the burden of both producing evidence raising that issue and of proving the accomplice status by a preponderance of the evidence.

(*People v. Belton* (1979) 23 Cal.3d 516, 523.)

Sufficiency of Corroboration
It is well-settled that the corroborative evidence need only "tend to connect" the defendant to the charged crime. The Supreme Court discussed this requirement at length in *People v. Szeto* (1981) 29 Cal.3d 20, 27 (all citations omitted):

> To corroborate the testimony of an accomplice, the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. 'The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient itself to establish every element of the offense charged.' 'Although the corroborating evidence must do more than raise a conjecture or suspicion of guilt, it is sufficient if it tends in some degree to implicate the defendant.' '[T]he corroborative evidence may be slight and entitled to little consideration when standing alone.

Independent evidence the defendants were in possession of property stolen during the crime is sufficient to corroborate an accomplice's testimony, as held in *People v. Narvaez* (2002, D037469) __ Cal.App.4th __:

> [Defendants] contend that evidence of possession of stolen property is insufficient to corroborate an accomplice's testimony because such evidence itself needs corroboration to prove a defendant's guilt. . . . [T]he defendant's position is without merit. It is established that "the possession of recently stolen property is sufficient to support corroboration for an accomplice's testimony." . . . Moreover, the reason for the rule requiring corroboration before evidence of possession of stolen property can raise an inference that the possessor is guilty of theft, is markedly different from the reason corroboration is required for accomplice testimony. . . . The evidence that the defendants were in possession of the stolen jewelry is direct physical evidence that does not rely on witness credibility. Thus, there is no taint of improper motive.

A Witness Who Is An Accomplice As a Matter of Law

> [A] court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed." (citations omitted.)

(*People v. Williams* (1997) 16 Cal.4th 635, 679.)

It is error to give the jury the option of determining whether a witness is an accomplice when that witness is an accomplice as a matter of law. *People v. Robinson* (1964) 61 Cal.2d 373, 44.

Cautionary Instruction Applies Only To Incriminating Evidence

> We . . . agree that the trial court should not be required to parse the testimony of an accomplice to determine whether it may be construed as "favorable" or "unfavorable" to the defendant. For that reason, we disapprove *People v. Graham* (citation omitted) to the extent it so requires. Instead, to avoid the burden on the trial court of such a requirement, and eliminate the potential for "mischief," we conclude . . . that the instruction concerning accomplice testimony should henceforth refer only to testimony that tends to incriminate the defendant. The present instruction admonishes the jury to view such accomplice testimony "with distrust," explaining that it should view such testimony "with care and caution" in light of all the evidence. We conclude that the phrase "care and caution" better articulates the proper approach to be taken by the jury to such evidence. Accordingly, we conclude that the jury should be instructed to the following effect whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: "To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case."

(*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

A Witness Who Does Not Share Defendant's Specific Criminal Intent Is Not An Accomplice

> The California courts have repeatedly held that one who feigns complicity in the commission of a crime for the purpose of detecting and prosecuting the perpetrator thereof is not an accomplice, and his testimony need not be corroborated.

(*People v. Salazar* (1962) 201 Cal.App.2d 284, 287.)

An Accomplice May Not Corroborate Another Accomplice

This rule is so well-settled that courts routinely apply it without expressly stating it. One example is *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15, which tacitly approved the rule by acknowledging that an instruction to that effect was sufficient in the context of that case:

> Applied to the facts of this particular case, the instruction given by the court charged the jury in effect that testimony of an accomplice could not be corroborated by that of another accomplice and rendered further instruction on the point unnecessary.

Accomplice Under the Age of 14

Penal Code Section 26 states that children under the age of 14 are not capable of committing a crime "[i]n the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness."

In *People v. Williams* (1936) 12 Cal.App.2d 207, 209, the Court of Appeal articulated the factors to consider in evaluating whether a child understood he had committed a "wrongful" act:

> [T]o justify the legal conclusion that the child was an accomplice of the defendant in the action, the "proof" must have been "clear" not only that the child understood the "nature and effect" of the act that constituted the offense; that the act was "forbidden"; that if he were to commit it, he would be punished; [and] . . . he must have been conscious at the time that "within the meaning obviously intended by the code", he was committing a "wrongful" act. (citations omitted.)

708SC. Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice

In order to prove the special circumstance[s] of _____ *<insert special circumstance[s] requiring proof of additional crime>***, the People must prove that the defendant committed _____** *<insert crime[s] (other than murder) that must be proved>***. The People have presented the testimony of _____** *<insert name[s] of witness[es]>* **on this issue.**

Special rules apply to the testimony of [an] accomplice[s].

If the crime[s] of _____ *<insert crime[s]>* **(was/were) committed, then _____** *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s] to (that/those) crime[s].]**

You may not find that the special circumstance[s] of _____ *<insert special circumstance[s] requiring proof of additional crime>* **is true based only on the testimony of an accomplice. You may use the testimony of an accomplice to find the special circumstance true only if:**

1. **The accomplice's testimony is supported by other evidence that you believe.**

2. **That supporting evidence is independent of the accomplice's testimony.**

AND

3. **That supporting evidence tends to connect the defendant to the commission of _____** *<insert crime[s] (other than murder) that must be proved>***.**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant committed _____ *<insert crime[s] (other than murder) that must be proved>***, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of _____** *<insert crime[s] (other than murder) that must be proved>***.**

[The evidence needed to support the testimony of one accomplice cannot be provided by the testimony of another accomplice.]

Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that testimony the weight you think it deserves after examining it with care and caution and in light of all the other evidence.

[This rule requiring supporting evidence also applies to accomplice statements made outside the courtroom (to _____ <*insert name*>**/on** _____ <*insert date*>**/**_____ <*insert other identification about out-of-court statement[s]*>**).]**

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct that testimony by an accomplice must be corroborated if that testimony is used to prove a special circumstance based on a crime other than the murder charged in the case. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1177.) "When the special circumstance requires proof of some other crime [besides the charged murder], that crime cannot be proved by the uncorroborated testimony of an accomplice. But when . . . it requires only proof of the motive for the murder for which defendant has already been convicted, the corroboration requirement . . . does not apply." *(Ibid.)*

Give this instruction only if the parties agree or the court finds as a matter of law that the witness is an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [only give instruction " 'if undisputed evidence established the complicity' "].) If there is a dispute about whether the witness is an accomplice, give Instruction 707SC, Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice.

Do not give this instruction if the witness is a confessing codefendant. Giving any accomplice instruction in a case where a codefendant has confessed could be tantamount to instructing that the defendant is guilty because he or she is an accomplice of an admittedly guilty person. (*People v. Hill* (1967) 66 Cal.2d 536, 555.)

Give the final bracketed paragraph beginning "This rule requiring supporting evidence" on request when the corroboration rule is being applied to out-of-court statements. (See *People v. Andrews* (1989) 49 Cal.3d 200, 214.)

Related Instructions

Instruction 707SC, Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice.

Instruction 480, Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice.

Instruction 481, Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice.

AUTHORITY

Duty to Instruct ▸ Pen. Code, § 1111; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1177; *People v. Guiuan* (1998) 18 Cal.4th 558, 569.

Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863.

Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569.

Defense Admissions May Provide Necessary Corroboration ▸ *People v. Williams* (1997) 16 Cal.4th 635, 680.

Definition of Accomplice as Aider and Abettor ▸ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.

Extent of Corroboration Required ▸ *People v. Szeto* (1981) 29 Cal.3d 20, 27.

One Accomplice May Not Corroborate Another ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15.

Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911.

Testimony of Feigned Accomplice Need Not Be Corroborated ▸ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193.

Uncorroborated Accomplice Testimony May Establish Corpus Delicti ▸ *People v. Williams* (1988) 45 Cal.3d 1268, 1317.

Witness an Accomplice as a Matter of Law ▸ *People v. Williams* (1997) 16 Cal.4th 635, 679.

3 Witkin& Epstein, Cal Evidence (4th ed. 2000) Presentation, § 98, p. 134 [wrongdoers who are not accomplices]; § 99, p. 136 ["accomplices" who appear to be victims]; § 105, p. 142.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 461.

STAFF NOTES

Pen. Code, § 1111:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

Duty to Provide Instruction Regarding Special Circumstance

> The jury was instructed that a special circumstance cannot be based on the testimony of an accomplice unless it is corroborated by evidence "tending to connect such defendant with the commission of *the offense*." Defendant argues that the instruction should have read evidence "tending to connect defendant with the *special circumstance*," because evidence connecting him with the murder would not corroborate accomplice testimony on a special circumstance.
>
> Defendant relies on *People* v. *Varnum* (1967) 66 Cal.2d 808, 814-815, which held that in the penalty phase of a capital trial, the prosecution could not prove an aggravating offense by the uncorroborated testimony of an accomplice. *Varnum*, however, did not impose a general requirement of corroboration; it was limited to evidence showing crimes other than the one charged and proved in the guilt trial, and rested on the rule that evidence of such other crimes must meet the rules of admissibility governing proof of those crimes. [Citations.]
>
> Our treatment of the corpus delicti requirement in connection with special circumstances presents a close analogy. [. . .] We adopt the same distinction here. When the special circumstance requires proof of some other crime [besides the charged murder], that crime cannot be proved by the uncorroborated testimony of an accomplice. But when [. . .] it requires only proof of the motive for the murder for

> which defendant has already been convicted, the corroboration requirement [. . .] does not apply.

(*People v. Hamilton* (1989) 48 Cal.3d 1142, 1176-77.)

Source
This instruction is based on Instruction 481, Accomplice Testimony: No Dispute Over Status of Witness. Notes to that Instruction follow here.

Sufficiency of Corroboration
It is well-settled that the corroborative evidence need only "tend to connect" the defendant to the charged crime. The Supreme Court discussed this requirement at length in *People v. Szeto* (1981) 29 Cal.3d 20, 27 (all citations omitted):

> To corroborate the testimony of an accomplice, the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. 'The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient itself to establish every element of the offense charged.' 'Although the corroborating evidence must do more than raise a conjecture or suspicion of guilt, it is sufficient if it tends in some degree to implicate the defendant.' '[T]he corroborative evidence may be slight and entitled to little consideration when standing alone.

Independent evidence the defendants were in possession of property stolen during the crime is sufficient to corroborate an accomplice's testimony, as held in *People v. Narvaez* (2002, D037469) __ Cal.App.4th __:

> [Defendants] contend that evidence of possession of stolen property is insufficient to corroborate an accomplice's testimony because such evidence itself needs corroboration to prove a defendant's guilt. . . . [T]he defendant's position is without merit. It is established that "the possession of recently stolen property is sufficient to support corroboration for an accomplice's testimony." . . . Moreover, the

> reason for the rule requiring corroboration before evidence of possession of stolen property can raise an inference that the possessor is guilty of theft, is markedly different from the reason corroboration is required for accomplice testimony. . . . The evidence that the defendants were in possession of the stolen jewelry is direct physical evidence that does not rely on witness credibility. Thus, there is no taint of improper motive.

A Witness Who Is An Accomplice As a Matter of Law

> [A] court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed." (citations omitted)

People v. Williams (1997) 16 Cal.4th 635, 679.

It is error to give the jury the option of determining whether a witness is an accomplice when that witness is an accomplice as a matter of law. *People v. Robinson* (1964) 61 Cal.2d 373, 44.

Cautionary Instruction Applies Only To Incriminating Evidence

> We . . . agree that the trial court should not be required to parse the testimony of an accomplice to determine whether it may be construed as "favorable" or "unfavorable" to the defendant. For that reason, we disapprove *People v. Graham* (citation omitted) to the extent it so requires. Instead, to avoid the burden on the trial court of such a requirement, and eliminate the potential for "mischief," we conclude . . . that the instruction concerning accomplice testimony should henceforth refer only to testimony that tends to incriminate the defendant. The present instruction admonishes the jury to view such accomplice testimony "with distrust," explaining that it should view such testimony "with care and caution" in light of all the evidence. We conclude that the phrase "care and caution" better articulates the proper approach to be taken by the jury to such evidence. Accordingly, we conclude that the jury should be instructed to the following effect whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: "To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it

> deserves after examining it with care and caution and in the light of all the evidence in the case."

People v. Guiuan (1998) 18 Cal.4th 558, 569.

An Accomplice May Not Corroborate Another Accomplice

This rule is so well-settled that courts routinely apply it without expressly stating it. One example is *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15, which tacitly approved the rule by acknowledging that an instruction to that effect was sufficient in the context of that case:

> Applied to the facts of this particular case, the instruction given by the court charged the jury in effect that testimony of an accomplice could not be corroborated by that of another accomplice and rendered further instruction on the point unnecessary.

721SC. Special Circumstances: Financial Gain, Pen. Code, § 190.2(a)(1)

The defendant is charged with the special circumstance of murder for financial gain.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intended that _____** *<insert name[s] or description[s] of decedent[s]>* **be killed.**

[**AND]**

2. **The killing was carried out for financial gain.**

[**AND**

3. **(The defendant/_____** *<insert name or description of principal if not defednant>***) expected the financial gain to result from the death of _____** *<insert name[s] or description[s] of decedent[s]>***.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

The third element should only be given when the defendant is also charged with a robbery-murder special circumstance. (*People v. Bigelow* (1984) 37 Cal.3d 731, 751; *People v. Howard* (1988) 44 Cal.3d 375, 409.) When both are charged, there is a risk that the jury will read the financial gain circumstance broadly, causing it to overlap with the robbery-murder special circumstance. (*People v. Bigelow, supra,* 37 Cal.3d at p. 751.) In such cases, the financial gain special circumstance is subject to "a limiting construction under which [it] applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant." *(Ibid.)*

The third element **should not** be given if the robbery-murder special circumstance is not charged. (*People v. Howard* (1988) 44 Cal.3d 375, 410.) "*Bigelow's*

formulation should be applied when it is important to serve the purposes underlying that decision, but . . . it is not intended to restrict construction of 'for financial gain' when overlap is *not* a concern." (*Ibid.* [emphasis in original].) In such cases, the unadorned language of the statute is sufficiently clear for the jury to understand. (*Id.* at pp. 408–409; *People v. Noguera* (1992) 4 Cal.4th 599, 635–637.)

AUTHORITY

Special Circumstance ‣ Pen. Code, § 190.2(a)(1).
Cannot Overlap With Robbery Murder ‣ *People v. Bigelow* (1984) 37 Cal.3d 731, 751; *People v. Montiel* (1985) 39 Cal.3d 910, 927.
Language of Statute Sufficient If No Robbery-Murder Charge ‣ *People v. Howard* (1988) 44 Cal.3d 375, 410; *People v. Noguera* (1992) 4 Cal.4th 599, 635–637.
Expectation of Financial Benefit ‣ *People v. Howard* (1988) 44 Cal.3d 375, 409; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1025; *People v. Noguera* (1992) 4 Cal.4th 599, 636.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 441.

RELATED ISSUES

Financial Gain Need Not Be Primary or Sole Motive
"[T]he relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain." (*People v. Howard* (1988) 44 Cal.3d 375, 409; *People v. Noguera* (1992) 4 Cal.4th 599, 636.) Financial gain does not have to be "a 'dominant,' 'substantial,' or 'significant' motive." (*People v. Noguera, supra,* 4 Cal.4th at pp. 635–636 [special circumstance applied where defendant both wanted to kill wife in order to be with another woman and to inherit her estate]; *People v. Michaels* (2002) 28 Cal.4th 486, 519 [applied where defendant wanted to protect friend from abuse by victim and help friend get proceeds of insurance policy].)

Need Not Actually Receive Financial Gain
"Proof of actual pecuniary benefit to the defendant from the victim's death is neither necessary nor sufficient to establish the financial-gain special circumstance." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1025–1026 [financial gain element satisfied where defendant believed death would relieve him of debt to victim even though legally not true]; *People v. Noguera* (1992) 4 Cal.4th 599, 636; *People v. Michaels* (2002) 28 Cal.4th 486, 519 [satisfied even though insurance company refused to pay].)

Defendant May Act for Another to Receive Financial Gain
"Defendant's other proffered instructions were similarly flawed. His second alternative would not have embraced the prospect that the killing was committed with the expectation that *another* would benefit financially . . . ." (*People v. Howard* (1988) 44 Cal.3d 375, 409, fn. 9 [emphasis in original]; see also *People v. Michaels* (2002) 28 Cal.4th 486, 519 [defendant killed for friend to receive insurance proceeds].)

Financial Gain Need Not Be Cash
"[A] murder for the purpose of avoiding a debt is a murder for financial gain . . . ." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1025 [avoidance of child support payments]; *see also People v. Silberman* (1989) 212 Cal.App.3d 1099, 1114–1115 [prevent discovery of embezzlement].) "A murder for purposes of eliminating a business competitor is a murder for financial gain . . . ." (*People v. McLead* (1990) 225 Cal.App.3d 906, 918 [elimination of rival drug dealer].) "[I]t makes little difference whether the coin of the bargain is money or something else of value: the vice of the agreement is the same, the calculated hiring of another to commit premeditated murder." (*People v. Padilla* (1995) 11 Cal.4th 891, 933 [payment in drugs sufficient].)

Murder for Hire: Hirer Need Not Receive Financial Gain

> [W]hen a person commits murder for hire, the one who did the hiring is guilty of the financial gain special circumstance only as an *accomplice*. (See, e.g., *People v. Bigelow, supra*, 37 Cal.3d at p. 750, fn. 11 [construing the 1978 law].) Moreover, in this case, before defendant could be found subject to the financial gain special circumstance as an accomplice, the jury was required to find that defendant had the intent to kill. (See *People v. Anderson* (1987) 43 Cal. 3d 1104, 1142 [". . . section 190.2(b) lays down a special rule for a certain class of first degree murderers: if the defendant is guilty as an aider and abetter, he must be proved to have acted with intent to kill before any special circumstance (with the exception of a prior murder conviction) can be found true."].)

(*People v. Padilla* (1995) 11 Cal.4th 891, 933; see also *People v. Bigelow* (1984) 37 Cal.3d 731, 751, fn.11 [emphasis in original]; *People v. Freeman* (1987) 193 Cal.App.3d 337, 339.)

STAFF NOTES

Pen. Code, § 190.2(a)(1):

The murder was intentional and carried out for financial gain.

Expectation of Financial Gain Standard

"[T]he relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain." (*People v. Howard* (1988) 44 Cal.3d 375, 409.)

> Proof of actual pecuniary benefit to the defendant from the victim's death is neither necessary nor sufficient to establish the financial-gain special circumstance. As we recently explained, "the relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain." (*People* v. *Howard*, *supra*, 44 Cal.3d at p. 409.) As so construed, the special circumstance provision is not constitutionally vague or overbroad. It has been widely recognized that murder for financial gain is an especially vile crime for which the death penalty may appropriately be imposed. (See, e.g., Model Pen. Code & Commentaries (part II, vol. 1) § 210.6, pp. 109-110.)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1025; see also *People v. Noguera* (1992) 4 Cal.4th 599, 636.)

Need Not Be "Direct" or "Motivating Cause"

> In *People v. Howard*, we rejected the claim that the unadorned language of the financial-gain special-circumstance instruction was flawed because it failed to convey to the jury any requirement that financial gain be the "direct" or "motivating cause" of the murder. Instead, we concluded that the drafters intended no such limitation.

(*People v. Noguera* (1992) 4 Cal.4th 599, 635.)

Risk of Overlap with Robbery-Murder

> [W]e believe the court should construe special circumstance provisions to minimize those cases in which multiple circumstances will apply to the same conduct, thereby reducing the risk that multiple findings on special circumstances will prejudice the

> defendant. Such a limiting construction will not prejudice the prosecution, since there will remain at least one special circumstance -- either financial gain or felony murder -- applicable in virtually all cases in which the defendant killed to obtain money or other property. We adopt a limiting construction under which the financial gain special circumstance applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the defendant.

(*People v. Bigelow* (1984) 37 Cal.3d 731, 751.)

Limitation on *Bigelow*

> *Bigelow* does not expressly require that instructions utilizing the limited construction adopted in that opinion be given in all cases. Even though such instructions may in some instances be necessary in order to avoid the overlap which that opinion is intended to cure, there is no such necessity here. Our major concern in *Bigelow* was to prevent overlapping special circumstances findings based on the same conduct. Defendant attempts to derive from that decision an interpretation of the financial-gain special circumstance which is more restrictive than is necessary to avoid application of multiple special circumstances to one form of conduct.
>
> *Bigelow's* final articulation of the scope of the provision must be viewed in terms of the problem it sought to correct. In this case, the victim's death was the "consideration" for the financial gain that defendant sought; in other words, defendant killed the victim in order to benefit financially. Use of the word "consideration" arguably conjures up contract law and may improperly, as is inherent in defendant's argument here, shift the focus backwards towards the time that a relevant "agreement" was made. We conclude, therefore, that *Bigelow's* formulation should be applied when it is important to serve the purposes underlying that decision, but that it is not intended to restrict construction of "for financial gain" when overlap is *not* a concern.

(*People v. Howard* (1988) 44 Cal.3d 375, 410; see also *People v. Noguera* (1992) 4 Cal.4th 599, 636.)

Plain Language of Statue Clear

> [T]he special circumstance of murder for financial gain "is not a technical one" and that the Legislature "intended [it] to cover a broad range of situations." (*People v. Howard, supra,* 44 Cal.3d at p. 410.) "It is well settled," we continued, "that where the terms 'have no technical meaning peculiar to the law, but are commonly understood by those familiar with the English language, instructions as to their meaning are not required.' " (*Id.,* at p. 408.) Here, as in *Howard,* "there is no necessity in this case for further refinement or restrictive interpretation of the [financial-gain] special circumstance in the absence of additional indications that the statutory language itself could have caused confusion." (*Id.,* at p. 410.)

(*People v. Noguera* (1992) 4 Cal.4th 599, 637.)

722SC. Special Circumstances: Multiple Murder Convictions (Same Case), Pen. Code, § 190.2(a)(3)

The defendant is charged with the special circumstance of having been convicted of more than one offense of murder in this case.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant has been convicted of at least one charge of first degree murder in this case.**

AND

2. **The defendant has also been convicted of at least one additional charge of first or second degree murder in this case.**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.) The court must submit the multiple-murder special circumstance to the jury unless the defendant has specifically waived jury trial on the special circumstance. (*People v. Marshall* (1996) 13 Cal.4th 799, 850.)

In a case in which the prosecution seeks the death penalty, only one special circumstance of multiple murder may be alleged. (*People v. Harris* (1984) 36 Cal.3d 36, 67; *People v. Anderson* (1987) 43 Cal.3d 1104, 1150.)

Intent to kill is not required unless the defendant was an aider and abettor. (*People v. Anderson, supra,* 43 Cal.3d at p. 1150.) If accomplice liability is an issue, give Instruction 702SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(3).
One Special Circumstance May Be Alleged ▸ *People v. Harris* (1984) 36 Cal.3d 36, 67; *People v. Anderson* (1987) 43 Cal.3d 1104, 1150.

Must Submit to Jury ▸ *People v. Marshall* (1996) 13 Cal.4th 799, 850.
Intent to Kill Not Required ▸ *People v. Anderson* (1987) 43 Cal.3d 1104, 1150.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 440.

RELATED ISSUES

Applies to Killing of Woman and Fetus
Application of the multiple-murder special circumstance to the killing of a woman and her unborn fetus is constitutional. (*People v. Dennis* (1998) 17 Cal.4th 468, 510.)

One Count of First Degree Murder Required
The defendant must be convicted of one count of first degree murder for this special circumstance to apply. (*People v. Williams* (1988) 44 Cal.3d 883, 923; *People v. Cooper* (1991) 53 Cal.3d 771, 828.) However, the additional murder or murders may be second degree. (*See People v. Miller* (1990) 50 Cal.3d 954, 995.)

STAFF NOTES

Pen. Code, § 190.2(a)(3):

> The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.

Must Submit to Jury

> Section 190.4 plainly contemplates a jury finding on a multiple-murder special-circumstance allegation unless the parties waive a jury. The trial court therefore erred in failing to submit the issue to the jury, and its error implicates the federal due process right.

(*People v. Marshall* (1996) 13 Cal.4th 799, 850.)

Intent to Kill Not Required

> Our analysis of the felony-murder special circumstance (Pt. III A, *ante*) is equally applicable here. First, the language of sections 190.2(a)(3) and 190.2(b) strongly supports the reading that intent to kill is not required unless the defendant is an aider and abetter rather than the actual killer. Second, a comparison of the multiple-murder special circumstance under the 1977 law--which contained an express intent-to-kill requirement (former Pen. Code, § 190.2, subd. (c)(5), Stats. 1977, ch. 316, § 9, pp. 1257-1258)--and the multiple-murder special circumstance under the present law--which contains no such requirement--compels that reading.
>
> In construing section 190.2(a)(3) to the contrary in *Turner*, we relied on our decision in *Carlos*. But we have now rejected the reasoning of *Carlos*. With its support gone, *Turner* must also fall.
>
> Accordingly, we overrule *Turner* to the extent it holds that intent to kill is an element of the multiple-murder special circumstance, and adopt the following reading of the relevant statutory provisions: intent to kill is not an element of the multiple-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved.

(*People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150.)

“Multiple” Multiple Murder Allegations-- Punishment
Although only one multiple murder special circumstance may be alleged, the defendant may be punished for each of the murders separately.

> The problem with charging "multiple" multiple-murder special circumstances, is the "inflate[d] . . . risk that the jury will arbitrarily impose the death penalty, . . ." (*People v. Harris* (1984) 36 Cal. 3d 36, 67 [201 Cal. Rptr. 782, 679 P.2d 433]), because of the sheer number of special circumstances charged and found true. Where the death penalty has not been sought, that concern should not be an issue, and it does not change the fundamental truth that all the murders in a multiple-murder crime spree have been deemed worthy of the ultimate penalty precisely because they are part of a multiple-murder sequence.

(*People v. Garnica* (1994) 29 Cal.App.4th 1558, 1563.) Thus, the defendant properly received two concurrent LWOP sentences for two murders, even though only one special circumstance was alleged and found true. (*Id.* at p. 1564.)

723SC. Special Circumstances: By Means of Destructive Device, Pen. Code, § 190.2(a)(4) & (6)

The defendant is charged with the special circumstance of murder by use of a (bomb[,]/ [or] explosive[,]/ [or] destructive device).

To prove that this special circumstance is true, the People must prove that:

1. **The murder was committed by using a (bomb[,]/ [or] explosive[,]/ [or] destructive device).**

<Alternative 2A—device planted, Pen. Code, § 190.2(a)(4)>

[2. The (bomb[,]/ [or] explosive[,]/ [or] destructive device) was planted, hidden, or concealed in any (place[,]/ [or] area[,]/ [or] dwelling[,]/ [or] building[,]/ [or] structure).]

<Alternative 2B—device mailed or delivered, Pen. Code, § 190.2(a)(6)>

[2. The defendant (mailed or delivered[,]/ [or] attempted to mail or deliver[,]/ [or] caused to be mailed or delivered) the (bomb[,]/ [or] explosive[,]/ [or] destructive device).]

AND

3. **The defendant knew, or reasonably should have known, that (his/her) actions would create a great risk of death to one or more human beings.**

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[A _____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an explosive.]**

[A *destructive device* is _____ *<insert definition supported by evidence from Pen. Code, § 12301>***.]**

[A _____ <*insert type of destructive device from Pen. Code, § 12301*> is a destructive device.]

[For the purpose of this special circumstance, a person may *deliver* a (bomb[,]/ [or] destructive device[,]/ [or] explosive) by throwing it.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

In element 2, give alternative 2A, stating that the device was "planted," if the defendant is charged with the special circumstance under Penal Code section 190.2(a)(4). Give alternative 2B, stating that the device was "mailed or delivered," if the defendant is charged with the special circumstance under Penal Code section 190.2(a)(6).

Give the bracketed paragraphs defining "explosive" if an explosive was used. (Health & Safety Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 603.) Give the bracketed definition of "destructive device," inserting the appropriate description from Penal Code section 12301, if a device covered by that statute was used. If the case involves a specific explosive listed in Health and Safety Code section 12000 or a specific destructive device listed in Penal Code section 12301, the court may also give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "Dynamite is an explosive." However, the court may not instruct the jury that the defendant used an explosive. For example, the court may not state that "the defendant used an explosive, dynamite," or "the material used by the defendant, dynamite, is an explosive." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A *bomb* is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

Give the bracketed sentence stating that "deliver" includes throwing if the facts demonstrate the item was thrown. (*People v. Snead* (1993) 20 Cal.App.4th 1088, 1095.)

If accomplice liability is an issue, give Instruction 702SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder.

AUTHORITY

Special Circumstance: Planting Device ▸ Pen. Code, § 190.2(a)(4).
Special Circumstance: Mailing or Delivering Device ▸ Pen. Code, § 190.2(a)(6).
Explosive Defined ▸ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 603.
Destructive Device Defined ▸ Penal Code, § 12301.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 444.

RELATED ISSUES

Gasoline Not an Explosive
"Under the statutory definition of explosive, the nature of the substance, not the manner in which a substance is used, is determinative." (*People v. Clark* (1990) 50 Cal.3d 583, 604 [gasoline, by its nature, not an explosive even where used to ignite a fire].)

STAFF NOTES

Pen. Code, § 190.2(a)(4):

> The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

Pen. Code, § 190.2(a)(6):

> The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

Health & Safety Code, § 12000, "Explosives":

> For the purposes of this part, "explosives" means any substance, or combination of substances, the primary or common purpose of which is detonation or rapid combustion, and which is capable of a relatively instantaneous or rapid release of gas and heat, or any substance, the primary purpose of which, when combined with others, is to form a substance capable of a relatively instantaneous or rapid release of gas and heat. "Explosives" includes, but is not limited to, any explosives as defined in Section 841 of Title 18 of the United States Code and published pursuant to Section 55.23 of Title 27 of the Code of Federal Regulations, and any of the following:
>
> (a) Dynamite, nitroglycerine, picric acid, lead azide, fulminate of mercury, black powder, smokeless powder, propellant explosives, detonating primers, blasting caps, or commercial boosters.
>
> (b) Substances determined to be division 1.1, 1.2, 1.3, or 1.6 explosives as classified by the United States Department of Transportation.
>
> (c) Nitro carbo nitrate substances (blasting agent) classified as division 1.5 explosives by the United States Department of

Transportation.

(d) Any material designated as an explosive by the State Fire Marshal. The designation shall be made pursuant to the classification standards established by the United States Department of Transportation. The State Fire Marshal shall adopt regulations in accordance with the Government Code to establish procedures for the classification and designation of explosive materials or explosive devices that are not under the jurisdiction of the United States Department of Transportation pursuant to provisions of Section 841 of Title 18 of the United States Code and published pursuant to Section 55.23 of Title 27 of the Code of Federal Regulations that define explosives .

(e) Certain division 1.4 explosives as designated by the United States Department of Transportation when listed in regulations adopted by the State Fire Marshal.

(f) For the purposes of this part, "explosives" does not include any destructive device, as defined in Section 12301 of the Penal Code, nor does it include ammunition or small arms primers manufactured for use in shotguns, rifles, and pistols.

Pen. Code, § 12301, "Destructive device"; "Explosive":

(a) The term "destructive device," as used in this chapter, shall include any of the following weapons:

(1) Any projectile containing any explosive or incendiary material or any other chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns.

(2) Any bomb, grenade, explosive missile, or similar device or any launching device therefor.

(3) Any weapon of a caliber greater than 0.60 caliber which fires fixed ammunition, or any ammunition therefor, other than a shotgun (smooth or rifled bore) conforming to the definition of a "destructive device" found in subsection (b) of Section 179.11 of Title 27 of the Code of Federal Regulations, shotgun ammunition (single projectile or shot), antique rifle, or an antique cannon. For purposes of this

section, the term "antique cannon" means any cannon manufactured before January 1, 1899, which has been rendered incapable of firing or for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade. The term "antique rifle" means a firearm conforming to the definition of an "antique firearm" in Section 179.11 of Title 27 of the Code of Federal Regulations.

(4) Any rocket, rocket-propelled projectile, or similar device of a diameter greater than 0.60 inch, or any launching device therefor, and any rocket, rocket-propelled projectile, or similar device containing any explosive or incendiary material or any other chemical substance, other than the propellant for such device, except such devices as are designed primarily for emergency or distress signaling purposes.

(5) Any breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.

(6) Any sealed device containing dry ice (CO[2]) or other chemically reactive substances assembled for the purpose of causing an explosion by a chemical reaction.

(b) The term "explosive," as used in this chapter, shall mean any explosive defined in Section 12000 of the Health and Safety Code.

Source of Definition of Explosive
The definition of explosive used here derives from the definition in Task Force Instruction 720, Murder: Degrees, defining first degree murder. (*See also People v. Clark* (1990) 50 Cal.3d 583, 603 [definition of explosive for special circumstance is the same as for first degree murder].)

Definition of Bomb
The following definition of “bomb” was approved of in *People v. Morse* (1992) 2 Cal.App.4th 620, 647 n8: "A 'bomb' is a device carrying an explosive charge fused to detonate under certain conditions.”

Other cases have held that the term “bomb” is not vague and is understood in is “common, accepted, and popular sense.” (*People v. Quinn* (1976) 57 Cal.App.3d

251, 258; *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25.) "Persons of common intelligence know what a bomb is." (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.)

A bomb must be capable of exploding when detonated. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) The device does not have to be a "projectile-type bomb" as used in the military. (*People v. Quinn, supra,* 57 Cal.App.3d at p. 258.)

724SC. Special Circumstances: Murder to Prevent Arrest or Escape, Pen. Code, § 190.2(a)(5)

The defendant is charged with the special circumstance of murder (to prevent arrest/ [or] to escape from custody).

To prove that this special circumstance is true, the People must prove that:

1. [The murder was committed to avoid or prevent a lawful arrest.]

[OR

2.] [The murder was committed while perfecting or attempting to perfect an escape from lawful custody.]

<A. Lawful Arrest>

[In order for a killing to be committed for the purpose of avoiding or preventing a lawful arrest, a lawful arrest must be [or appear to be] imminent.]

[Instruction _____ *<insert instruction number>* **explains when an officer is unlawfully arresting someone.]**

[A peace officer may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

An officer has *probable cause* to arrest when he or she knows facts that would lead a person of ordinary care and prudence to honestly and strongly suspect that the person to be arrested is guilty of a crime.

[In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

[[On the other hand,] (In/in) order for an officer to lawfully arrest someone for a (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence; see Bench Notes>***) without a warrant, that officer must have**

probable cause to believe the person to be arrested committed a (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence; see Bench Notes>***). However, it is not required that the offense be committed in the officer's presence.]**

_____ *<insert crime that was basis for arrest>* **is a (felony/misdemeanor/infraction).**

[In order for an officer to enter a home without a warrant to arrest someone:

1. **The officer must have probable cause to believe that the person to be arrested committed a crime.**

AND

2. **Exigent circumstances require the officer to enter the home without a warrant.**

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest.] [The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing from the commission of a crime, or has escaped from custody.] [The officer must also tell the arrested person the offense for which (he/she) is being arrested if (he/she) asks for that information.]]

<GIVE IN ALL CASES WHERE LAWFUL ARREST IS AN ISSUE.>
[The People have the burden of proving beyond a reasonable doubt that _____ **<***insert name[s] of officers[s], excluding title[s]>* **(was/were) lawfully arresting (the defendant/someone). If the People have not met this burden, you must find the special circumstance has not been proved.]**

<B. Escape From Custody>
[A killing is committed *while perfecting or attempting to perfect escape* from lawful custody if a person is killed during the escape itself or while the prisoner[s] (is/are) fleeing from the scene.

A killing is not committed *while perfecting or attempting to perfect escape* if the prisoner[s] (has/have) actually reached a temporary place of safety before the killing.]

[*Lawful custody* includes (confinement/placement) in (county jail/prison/the California Youth Authority/work furlough/_____ <*insert name or description of other detention facility, see Pen. Code, § 4532*>.] [A person is in lawful custody if he or she has been entrusted to the custody of an officer or other individual during a temporary release from the place of confinement.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

Give the bracketed paragraph stating that the arrest must be "imminent" only if the evidence does not clearly establish that an arrest would have been made in the near future. (See *People v. Bigelow* (1984) 37 Cal.3d 731, 752; *People v. Cummings* (1993) 4 Cal.4th 1233, 1300–1301.) For example, it may be appropriate to instruct that the arrest must be imminent if no peace officer is present or if the decedent is not a peace officer. (See *People v. Cummings, supra,* 4 Cal.4th at pp. 1300–1301; but see *People v. Vorise* (1999) 72 Cal.App.4th 312, 322.)

If the lawfulness of the arrest is an issue, give the appropriate bracketed paragraphs on lawfulness if those instructions have not already been given in the instructions for another offense. If the instructions have been given, use the bracketed paragraph directing the jury to that instruction. Always give the bracketed paragraph on the burden of proof when lawful performance is an issue.

In the paragraphs relating to unlawful arrest, several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer's presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen. Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning "In

order for an officer to lawfully arrest someone without a warrant . . . .” If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

In cases involving multiple crimes, use the paragraph that specifies the crime that was the basis for the arrest as many times as needed to describe each underlying crime separately.

Give the bracketed language about entering a home under exigent circumstances if the arrest took place in the defendant’s home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

Give the bracketed paragraphs defining “perfecting or attempting to perfect escape” if there is an issue in the case about whether the defendant had reached a temporary place of safety prior to the killing. (See *People v. Bigelow* (1984) 37 Cal.3d 731, 754.)

Give the bracketed paragraph explaining lawful custody if there is an issue about whether the defendant was in lawful custody. (See Pen. Code, § 4532; *People v. Diaz* (1978) 22 Cal.3d 712, 716–717.)

If accomplice liability is an issue, give Instruction 702SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Other Than Felony Murder.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(5).

Arrest Must Be Imminent ▸ *People v. Bigelow* (1984) 37 Cal.3d 731, 752; *People v. Coleman* (1989) 48 Cal.3d 112, 146; *People v. Cummings* (1993) 4 Cal.4th 1233, 1300–1301.

Killing During Escape Must Be During Hot Pursuit ▸ *People v. Bigelow* (1984) 37 Cal.3d 731, 754.

Lawful Custody ▸ See Pen. Code, § 4532 (escape from custody); *People v. Diaz* (1978) 22 Cal.3d 712, 716–717.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 442.

STAFF NOTES

Pen. Code, § 190.2(a)(5):

> The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.

Pen. Code, § 4532:

> (a)(1) Every prisoner arrested and booked for, charged with, or convicted of a misdemeanor [. . .] who is confined in any county or city jail, prison, industrial farm, or industrial road camp, is engaged on any county road or other county work, is in the lawful custody of any officer or person, is employed or continuing in his or her regular educational program or authorized to secure employment or education away from the place of confinement, [. . .] is authorized for temporary [. . .], or is a participant in a home detention program pursuant to Section 1203.016, and who thereafter escapes or attempts to escape from the county or city jail, prison, industrial farm, or industrial road camp or from the custody of the officer or person in charge of him or her while engaged in or going to or returning from the county work or from the custody of any officer or person in whose lawful custody he or she is, or from the place of confinement in a home detention program pursuant to Section 1203.016, is guilty of a felony [. . . .]
>
> [. . .]
>
> (b) (1) Every prisoner arrested and booked for, charged with, or convicted of a felony, and every person committed by order of the juvenile court, who is confined in any county or city jail, prison, industrial farm, or industrial road camp, is engaged on any county road or other county work, is in the lawful custody of any officer or person, or is confined pursuant to Section 4011.9, is a participant in a home detention program pursuant to Section 1203.016, who escapes or attempts to escape from a county or city jail, prison, industrial farm, or industrial road camp or from the custody of the officer or person in charge of him or her while engaged in or going to or returning from the county work or from the custody of any officer or person in whose lawful custody he or she is, or from confinement pursuant to Section 4011.9, or from the place of

> confinement in a home detention program pursuant to Section 1203.016, is guilty of a felony [. . . .]

Arrest Must be Imminent

> We find no evidence in the record that Cherry was murdered to avoid or prevent a lawful arrest. At the time of the killing Bigelow and Ramandonovic were not under arrest and were not threatened with imminent arrest. Although the prosecutor surmised that Cherry was killed so that he would not report the robbery and kidnaping -- a report which might eventually lead to the men's arrest -- this argument is totally speculative. It is also an unreasonably expansive reading of the special circumstance of avoiding arrest, a reading which would cause that circumstance to overlap extensively with felony murder. We believe the special circumstance of avoiding arrest should be limited to cases in which the arrest is imminent.

(*People v. Bigelow* (1984) 37 Cal.3d 731, 752; *see also People v. Coleman* (1989) 48 Cal.3d 112, 146 [killing was not to prevent arrest where victim yelled to neighbor to call police just before killing; *People v. Cummings* (1993) 4 Cal.4th 1233, 1300-1301 [arrest was imminent where defendant had been detained by police officer victim].)

Instruction on "Imminent Arrest"

In *People v. Cummings* (1993) 4 Cal.4th 1233, 1300-1301, the court found it was not necessary to instruct the jury that the arrest must be "imminent" where the police officer victim had just detained the defendant. The court observed,

> Had the possibility of arrest been more remote, i.e., had there been no peace officer present or less reason to believe the defendant feared arrest, a supplemental instruction might have been appropriate, but the failure to give one here was not error, let alone error of constitutional dimension.

(*People v. Cummings, supra,* 4 Cal.4th at p. 1300-1301.)

In *People v. Vorise* (1999) 72 Cal.App.4th 312, 322-323, the Court of Appeals also concluded that it was not necessary to explain to the jury that the arrest must be imminent even though no peace officer was present at the time of the killing. In *Vorise, supra,* the defendant shot the civilian victim after the victim said she was going to call the police. (*Id*. at p. 322.) The court found "there was a direct connection between the perceived threat of imminent arrest and the murder; the

special circumstance finding here was not based on mere speculation." (*Ibid*.) Thus, the court concluded, the additional instruction on "imminent arrest" was not necessary. (*Id.* at p. 322-323.)

The instruction includes a bracketed sentence explaining that the arrest must be imminent for the court to use at its discretion.

Lawfulness of Arrest
The language for the instructions on lawfulness of the arrest is derived from Task Force Instruction 859, Battery on a Peace Officer.

Escape Complete When Reach Temporary Place of Safety

> We are confident that the special circumstance of murder "to perfect an escape" was intended to apply to an inmate who kills while breaking out of a prison, even though he has already escaped from his cell; it should likewise apply to an inmate who kills during hot pursuit after departing the prison confines. The limiting language suggested by defendant's cases would exclude such murders on the ground that the defendant had already left the portion of the prison to which he was legally confined.
>
> The broad test suggested by the Attorney General is equally unsatisfactory. Under his concept of "once an escapee, always an escapee," a murder 20 years after an escape would fall within the special circumstance if motivated in part by a desire to avoid returning to custody. Under this reasoning, an escape could never be "perfected," a view which is inconsistent with the statutory language.
>
> We adopt a middle position, drawing upon the test used in felony-murder cases to determine when a killing is so closely related to an underlying felony as to justify an enhanced punishment for the killing. Under this test, even though every element of a crime has been fulfilled (and thus in a sense, the crime has been "perfected"), the crime continues until the criminal has reached a place of temporary safety.

(*People v. Bigelow* (1984) 37 Cal.3d 731, 753.)

Lawful Custody
The definition of lawful custody is derived from Penal Code section 4532, Escape from Lawful Custody and *People v. Diaz* (1978) 22 Cal.3d 712,

716-717. Penal Code section 4532 requires that the person be "arrested and booked for" an offense before coming within the purview of the escape statute. In *People v. Diaz, supra,* 22 Cal.3d at p. 716, the court concluded that the provision thus applied to "a person who has been booked, incarcerated at the time of his escape, or previously so incarcerated and temporarily in custody outside the confinement facility." (*See also Id.* at p. 715 ["the legislative history of that section indicated that it applies only to persons incarcerated in jails and other institutions of confinement who escape there from or such persons who escape from the custody of those to whom they have been entrusted while temporarily outside such places of confinement"].) Finally, the court noted that a person who has not yet been "booked" for an offense is properly charged with resisting arrest. (*Id.* at p. 717.)

The comparable CALJIC does not define lawful custody at all.

725SC. Special Circumstances: Murder of Peace Officer, Federal Officer, or Firefighter, Pen. Code, § 190.2(a)(7), (8) & (9)

The defendant is charged with the special circumstance of murder of a (peace officer/federal law enforcement officer/firefighter).

To prove that this special circumstance is true, the People must prove that:

1. **_____** *<insert name[s] or description[s] of decedent[s], excluding title[s]>***, (was/were) [a] (peace officer[s]/federal law enforcement officer[s]/firefighter[s]) lawfully performing the duties of (a/an) _____** *<insert title[s] of peace officer[s] specified in Pen. Code, § 830 et seq., or title[s] of federal officer[s] or firefighter[s]>***].**

2. **(The defendant/_____** *<insert name or description of principal if not defendant>***) intentionally killed _____** *<insert name[s] or description[s] of decedent[s], excluding title[s]>***.**

AND

<Alternative 3A—killing during performance of duties>

[3. When _____ *<insert name[s] or description[s] of decedent[s], excluding title[s]>* **(was/were) killed, the defendant knew, or reasonably should have known, that _____** *<insert name[s] or description[s] of decedent[s], excluding title[s]>* **(was/were) [a] (peace officer[s]/federal law enforcement officer[s]/firefighter[s]) who (was/were) performing (his/her/their) duties.]**

<Alternative 3B—killing in retaliation>

[3. _____ *<insert name[s] or description[s] of decedent[s], excluding title[s]>* **(was/were) killed in retaliation for the performance of (his/her/their) official duties.]**

[A sworn member of _____ *<insert name of agency that employs peace officer>***, authorized by _____** *<insert appropriate section from Pen. Code, § 830 et seq.>* **to _____** *<describe statutory authority>***, is a *peace officer*.]**

The duties of a _____ *<insert title of peace officer specified in Pen. Code, § 830 et seq., or title of federal officer or firefighter>* **include _____** *<insert job duties>***.**

[A *firefighter* includes anyone who is an officer, employee, or member of a (governmentally operated (fire department/fire protection or firefighting agency) in this state/federal fire department/federal fire protection or firefighting agency), whether or not he or she is paid for his or her services.]

[A (peace officer/federal law enforcement officer) is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).] *<Give one or more of the following bracketed paragraphs defining lawfulness of officer's conduct if these instructions are not already given to the jury in the instructions for another offense. If the instructions have already been given, use the first bracketed paragraph below.>*

<Instruction Already Given>
[Instruction _____ *<insert instruction number>* **explains when an officer is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force when (making/attempting to make) an otherwise lawful arrest or detention).]**

<A. Unlawful Detention>
[A (peace officer/federal law enforcement officer) may legally detain someone if:

1. **He or she knows specific facts that lead him or her to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime.**

AND

2. **A reasonable officer who knew the same facts would have the same suspicion.**

Any other detention is unlawful.

In deciding whether the detention was unlawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained the person.]

<B. Unlawful Arrest>

[A (peace officer/federal law enforcement officer) may legally arrest someone [either] (on the basis of an arrest warrant/ [or] if he or she has probable cause to make the arrest).

Any other arrest is unlawful.

An officer has *probable cause* to arrest when he or she knows facts that would lead a person of ordinary care and prudence to honestly and strongly suspect that the person to be arrested is guilty of a crime.

[In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.]

[[On the other hand,] (In/in) order for an officer to lawfully arrest someone for a (felony/ [or] _____ *<insert misdemeanor not requiring commission in officer's presence; see Bench Notes>***) without a warrant, that officer must have probable cause to believe the person to be arrested committed a (felony/ [or] _____** *<insert misdemeanor not requiring commission in officer's presence; see Bench Notes>***). However, it is not required that the offense be committed in the officer's presence.]**

_____ *<insert crime that was basis for arrest>* **is a (felony/misdemeanor/infraction).**

[In order for an officer to enter a home without a warrant to arrest someone:

1. **The officer must have probable cause to believe that the person to be arrested committed a crime.**

AND

2. **Exigent circumstances require the officer to enter the home without a warrant.**

The term *exigent circumstances* describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence.]

[The officer must tell that person that the officer intends to arrest him or her, why the arrest is being made, and the authority for the arrest.] [The officer does not have to tell the arrested person these things if the officer has probable cause to believe that the person is committing or attempting to commit a crime, is fleeing from the commission of a crime, or has escaped from custody.] [The officer must also tell the arrested person the offense for which (he/she) is being arrested if (he/she) asks for that information.]

<C. Use of Force>

[Special rules control the use of force.

A (peace officer/federal law enforcement officer) may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense.

If a person knows, or reasonably should know, that an officer is arresting or detaining him or her, the person must not use force or any weapon to resist an officer's use of reasonable force.

If an officer uses unreasonable or excessive force while (arresting/attempting to arrest/detaining/attempting to detain) a person, that person may lawfully use reasonable force to defend (himself/herself).

A person being arrested uses *reasonable force* when he or she uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force. The force must be no more than that which a reasonable person in the same situation would believe is necessary for his or her protection.]

<GIVE IN ALL CASES WHERE LAWFUL PERFORMANCE IS AN ISSUE.>

[The People have the burden of proving beyond a reasonable doubt that _____ <*insert name[s] or description[s] of decedent[s], excluding title[s]***> (was/were) lawfully performing the duties of _____ <***insert title[s]***>. If the People have not met this burden, you must find the special circumstance has not been proved.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

In element 3, give alternative 3A, stating that the defendant knew or should have known that the decedent was an officer or firefighter engaged in the performance of his or her duties, if the prosecution theory is that the killing occurred while the decedent was carrying out official duties. If the prosecution's theory is that the killing was in retaliation for the officer's performance of his or her duties, give alternative 3B, stating that the killing was in retaliation. The retaliation theory does not apply to the killing of a firefighter. (Pen. Code, § 190.2(a)(9).)

In order to be "engaged in the performance of his or her duties," a peace officer must be acting lawfully. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.) "[D]isputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element." *(Ibid.)* The court has a **sua sponte** duty to instruct on defendant's reliance on self-defense as it relates to the use of excessive force. (*People v. White* (1980) 101 Cal.App.3d 161, 167–168.) On request, the court must instruct that the People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145.) If excessive force is an issue, the court has a **sua sponte** duty to instruct the jury that the defendant is not guilty of the offense charged or any lesser included offense if he or she used reasonable force in response to excessive force. (*People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47.)

Give the appropriate bracketed paragraphs on the lawfulness of the officer's conduct and use of force if those instructions have not already been given in the instructions for another offense. If the instructions have been given, use the bracketed paragraph directing the jury to that instruction. Always give the final bracketed paragraph on the burden of proof when lawful performance is an issue.

In the paragraphs headed "A. Unlawful Detention," if the case presents a factual issue of whether the defendant was in fact detained, the court should provide the jury with a definition of when a person is legally detained.

In the paragraphs headed "B. Unlawful Arrest," several options are given depending on the crime for which the arrest was made. The general rule is that an officer may not make an arrest for a misdemeanor or infraction unless the offense was committed in the officer's presence. (See Pen. Code, § 836(a)(1).) Statutes provide exceptions to this requirement for some misdemeanors. (See, e.g., Pen.

Code, § 836(c) [violation of domestic violence protective or restraining order]; Veh. Code, § 40300.5 [driving under the influence plus traffic accident or other specified circumstance].) If the defense does not rely on the statutory limitation, neither bracketed paragraph regarding arrest without a warrant need be given. If the only offense on which the officer relied in making the arrest is a nonexempted misdemeanor or an infraction, give the first bracketed paragraph beginning "In order for an officer to lawfully arrest someone without a warrant . . . ." If the officer allegedly made the arrest for both a misdemeanor or infraction *and* a felony or exempted misdemeanor, give both bracketed paragraphs.

Give the bracketed language about entering a home under exigent circumstances if the arrest took place in the defendant's home. (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777.)

Penal Code section 190.2(a)(7) defines "peace officer" as "defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12."

The jury must determine whether the decedent is a peace officer. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury in the appropriate definition of "peace officer" from the statute (e.g., "a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the decedent was a peace officer as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)*

Penal Code section 190.2(a)(9) defines "firefighter" "as defined in Section 245.1."

If the decedent was a federal law enforcement officer or agent, then the term "federal law enforcement officer" may need to be defined for the jury depending on the decedent's position.

AUTHORITY

Special Circumstance: Peace Officer ▸ Pen. Code, § 190.2(a)(7).
Special Circumstance: Federal Officer ▸ Pen. Code, § 190.2(a)(8).
Special Circumstance: Firefighter ▸ Pen. Code, § 190.2(a)(9).
Engaged in Performance of Duties ▸ *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, §§ 455, 456.

RELATED ISSUES

Reasonable Knowledge Standard

Application of the special circumstance to a defendant who "reasonably should have known" that the decedent was a peace officer is constitutional. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 781–782.)

> [I]n appropriate cases it would be proper for the court to instruct that a defendant may not be found guilty of the special circumstance at issue here (even if he reasonably should have known his victim was a peace officer engaged in the performance of his duty) if, by reason of *non-self-induced* "diminished capacity," defendant was *unable actually to know* the status of his victim.

(*Id.* at p. 781, fn. 18 [emphasis in original].) Such an instruction is not warranted in a case were the defendant is voluntarily intoxicated or has otherwise "self-induced diminished capacity." (*People v. Brown* (1988) 46 Cal.3d 432, 445, fn. 7.)

Service of Warrant

"Engaged in duties" includes "the correct service of a facially valid search or arrest warrant, regardless of the legal sufficiency of the facts shown in support of the warrant." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222.) If the officer was serving a facially valid warrant, the court may instruct that the duties of the officer included service of the warrant. On the other hand, "the proper *service* of a warrant is a jury issue under the engaged-in-duty requirement." (*Id.* at p. 1223 [emphasis in original].) If there is a factual dispute over the manner in which the warrant was served, the court should instruct the jury on the requirements for legal service of the warrant. *(Ibid.)*

Lawfulness of Officer's Conduct Based on Objective Standard

The rule "requires that the officer's lawful conduct be established as an objective fact; it does not establish any requirement with respect to the defendant's mens rea." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020.) The defendant's belief about whether the officer was or was not acting lawfully is irrelevant. (*Id* at p. 1021.)

STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

> (7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.
>
> (8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.
>
> (9) The victim was a firefighter, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.

"Peace Officer":
Pen. Code section 190.2(a)(7) defines a peace officer as "defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12 . . ." This includes a wide range of public employees from every level of government.

"Firefighter":
Pen. Code section 190.2(a)(9) defines firefighter "as defined in Section 245.1," which states,

> "fireman" or "firefighter" includes any person who is an officer, employee or member of a fire department or fire protection or

> firefighting agency of the federal government, the State of California, a city, county, city and county, district, or other public or municipal corporation or political subdivision of this state, whether this person is a volunteer or partly paid or fully paid.

Structure of Instruction
This instruction is based on Instruction 859, Battery Against Peace Officer, and Instruction 764, Attempted Murder of Peace Officer.

Performance of Duties Requires Lawful Conduct

> California cases hold that although the court, not the jury, usually decides whether police action was supported by legal cause, disputed facts bearing on the issue of legal cause must be submitted to the jury considering an engaged-in-duty element, since the lawfulness of the victim's conduct forms part of the corpus delicti of the offense.

(*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [footnote omitted].)

Burden of Proof on Lawful Performance of Duties
The People have the burden of proving the lawfulness of the arrest beyond a reasonable doubt and the court must so instruct on request. (*People v. Castain* 1981) 122 Cal.App.3d 138, 145.) It is never within the scope of an officer's duties to make an unlawful arrest. (*People v. Curtis* (1969) 70 Cal.2d 347, 354.)

Reasonably Knew Decedent Was Officer and Retaliation

> We observe that in the first part of the subdivision defining the special circumstance of killing a peace officer engaged in the performance of his or her duties, the statute does contain a knowledge component requiring that the defendant know the identity of the victim as a peace officer. In the second part, no knowledge requirement appears. This omission presumably occurred because the defendant's knowledge of the victim's identity as a peace officer is established by the jury's determination that the defendant acted with the purpose of retaliating for the officer's conduct of his or her official duties. Certainly there is no basis for interpreting the portion of the special circumstance relating to retaliation to require that the defendant have a subjective belief that the officer was acting lawfully when he or she performed the duties for which defendant sought to retaliate. Such an interpretation would be inconsistent with the purpose of the special circumstance to afford special protection

to officers who risk their lives to protect the community, and obviously would undermine the deterrent effect of the special circumstance.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1021.)

726SC. Special Circumstances: Murder of Witness, Pen. Code, § 190.2(a)(10)

The defendant is charged with the special circumstance of murder of [a] witness[es].

To prove that this special circumstance is true, the People must prove that:

1. **_____** *<insert name[s] or description[s] of decedent[s]>* **(was/were) [a] witness[es] to a crime.**

2. **(The defendant/_____** *<insert name or description of principal if not defendant>***) intentionally killed _____** *<insert name[s] or description[s] of decedent[s]>***.**

3. **The killing was not committed during the commission [or attempted commission] of the crime to which _____** *<insert name[s] or description[s] of decedent[s]>* **(was/were) [a] witness[es].**

AND

4. **The defendant intended that _____** *<insert name[s] or description[s] of decedent[s]>* **be killed (to prevent (him/her/them) from testifying in any (criminal/ [or] juvenile) proceeding/ [or] in retaliation for (his/her/their) testimony in any criminal or juvenile proceeding.)**

[A killing is committed *during the commission [or attempted commission] of a crime* if the killing and the crime are part of one continuous transaction. The continuous transaction may occur over a period of time or in more than one location.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

The last bracketed paragraph should be given if there is evidence that the killing and the crime witnessed were part of one continuous transaction. (*People v. Silva* (1988) 45 Cal.3d 604, 631.)

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(10).
Continuous Transaction ▸ *People v. Silva* (1988) 45 Cal.3d 604, 631; *People v. Benson* (1990) 52 Cal.3d 754, 785; *People v. Beardslee* (1991) 53 Cal.3d 68, 95.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 457.

RELATED ISSUES

Purpose of Killing
In order for this special circumstance to apply, the defendant must kill the witness for the purpose of preventing him or her from testifying or in retaliation for his or her testimony. (*People v. Stanley* (1995) 10 Cal.4th 764, 800.) However, this does not have to be the sole or predominant purpose of the killing. (*Ibid.; People v. Sanders* (1990) 51 Cal.3d 471, 519.)

Victim Does Not Have to Be An Eyewitness or Important Witness
"[N]othing in the language of the applicable special circumstance or in our decisions applying this special circumstance supports the suggestion that the special circumstance is confined to the killing of an 'eyewitness,' as opposed to any other witness who might testify in a criminal proceeding." (*People v. Jones* (1996) 13 Cal.4th 535, 550.) "It is no defense to the special circumstance allegation that the victim was not an important witness in the criminal proceeding, so long as one of the defendant's purposes was to prevent the witness from testifying." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1018; see also *People v. Bolter* (2001) 90 Cal.App.4th 240, 242–243 [special circumstance applied to retaliation for testifying where witness's actual testimony was "innocuous"].)

Defendant Must Believe Victim Will Be Witness
"[S]ection 190.2, subd. (a)(10) is applicable if defendant *believes* the victim will be a witness in a criminal prosecution, whether or not such a proceeding is pending or about to be initiated." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1018 [emphasis in original]; see also *People v. Weidert* (1985) 39 Cal.3d 836, 853 [abrogated by statutory amendment]; *People v. Sanders* (1990) 51 Cal.3d 471, 518.)

STAFF NOTES

Pen. Code, § 190.2(a)(10):

> The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

Applies to Witness in Juvenile Proceedings

Penal Code section 190.2(a)(10) was amended by Proposition 115 in 1990 to expressly provided that the special circumstance applies when the defendant kills to prevent the witness from testifying in a juvenile proceeding. This amendment abrogated *People v. Weidert* (1985) 39 Cal.3d 836, 843, which had held that the previous version of the statute did not apply to juvenile proceedings. The effective date of this change was June 5, 1990.

Crime and Killing May Not be Part of Continuous Transaction

> The kidnapping, robbery and murder were part of one continuous transaction. A witness-murder special-circumstance finding must fall if the killing was committed "during the commission, or attempted commission of the crime to which [the person killed] was a witness." (§ 190.2, subd. (a)(10).) Clearly, if defendant had only robbed Kevin and then killed him, a witness-murder special-circumstance finding could not stand because the murder was committed during the commission of the robbery. Similarly, if defendant had only kidnapped and killed Kevin and Laura, a witness-murder special-circumstance finding could not stand because the murder was committed during the commission of the kidnapping. Here, the Attorney General argues that Kevin "witnessed" the robbery of Laura. But again, the robbery of Laura was part of the same continuous criminal transaction which included the kidnapping of Laura and Kevin and the robbery of Kevin. Lacking evidence that the murder was not simply part of the same continuous criminal transaction, we must set aside the witness-murder special-circumstance finding.

(*People v. Silva* (1988) 45 Cal.3d 604, 631; see also *People v. Benson* (1990) 52 Cal.3d 754, 785; *People v. Beardslee* (1991) 53 Cal.3d 68, 95.)

Elements

> The elements of the witness-killing special circumstance have been stated thus: "(1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she had witnessed." (*People* v. *Garrison* (1989) 47 Cal.3d 746, 792 [254 Cal.Rptr. 257, 765 P.2d 419].)

(*People v. Benson* (1990) 52 Cal.3d 754, 784.)

727SC. Special Circumstances: Murder of Judge, Prosecutor, Government Official, or Juror, Pen. Code, §§ 190.2(a)(11), (12), (13) & (20)

The defendant is charged with the special circumstance of murder of a (prosecutor/judge/government official/juror).

To prove that this special circumstance is true, the People must prove that:

1. **_____** *<insert name[s] or description[s] of decedent[s]>* **(was/were) [a] (prosecutor[s]/judge[s]/government official[s]/juror[s] in _____** *<insert name or description of local, state, or federal court of record in this or another state>***).**

2. **(The defendant/_____** *<insert name or description of principal if not defendant>***) intentionally killed _____** *<insert name[s] or description[s] of decedent[s]>***.**

AND

3. **The defendant intended that _____** *<insert name[s] or description[s] of decedent[s]>* **be killed (to prevent (him/her/them) from performing (his/her/their) official duties as [a] (prosecutor[s]/judge[s]/government official[s]/juror[s])/ [or] in retaliation for _____'s** *<insert name[s] or description[s] of decedent[s]>* **performance of (his/her/their) official duties as [a] (prosecutor[s]/judge[s]/government official[s]/juror[s]).)**

[A _____ *<insert title of government official's position>* **is an (elected/appointed) government official.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

The jury must determine whether the decedent is a prosecutor, judge, juror, or government official. (*People v. Brown* (1988) 46 Cal.3d 432, 444–445.) The court may instruct the jury on the appropriate definition of "government official" (e.g.,

"a Garden Grove Regular Police Officer and a Garden Grove Reserve Police Officer are peace officers"). *(Ibid.)* However, the court may not instruct the jury that the decedent was a government official as a matter of law (e.g., "Officer Reed was a peace officer"). *(Ibid.)*

AUTHORITY

Special Circumstance: Prosecutor ▸ Pen. Code, § 190.2(a)(11).
Special Circumstance: Judge ▸ Pen. Code, § 190.2(a)(12).
Special Circumstance: Government Official ▸ Pen. Code, § 190.2(a)(13).
Special Circumstance: Juror ▸ Pen. Code, § 190.2(a)(20).

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 458.

STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

> (11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.
>
> (12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.
>
> (13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.
>
> (20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

No Cases on Special Circumstances
Staff did not locate any published cases in which these special circumstances were charged.

728SC. Special Circumstances: Lying in Wait—Before March 8, 2000, Pen. Code, § 190.2(a)(15)

The defendant is charged with the special circumstance of murder committed while lying in wait.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intentionally killed _____** *<insert name[s] or description[s] of decedent[s]>***.**

AND

2. **The defendant committed the murder while lying in wait.**

A person commits murder while lying in wait if:

1. **(He/She) concealed (his/her) purpose from the person killed.**

2. **(He/She) waited and watched for an opportunity to act.**

3. **Immediately after watching and waiting, (he/she) made a surprise attack on the person killed from a position of advantage.**

AND

4. **(He/She) intended to kill the person by taking the person by surprise.**

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial and must show a state of mind equivalent to deliberation or premeditation. [A person acts with *deliberation* or *premeditation* if, before acting, the person carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act.]

In order for a murder to be committed while lying in wait, the attack must immediately follow the period of watching and waiting. The lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends. If there is a detectable interruption between the period

of watching and waiting and the period during which the killing takes place, then the murder is not committed while lying in wait. If you have a reasonable doubt whether the murder was committed while lying in wait, you must find this special circumstance has not been proved.

[A person may conceal his or her purpose even though the person killed is aware of the other person's physical presence.]

[The concealment may be accomplished by ambush or some other secret plan.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

Prior to March 8, 2000, the lying in wait special circumstance required that the murder be committed "while" lying in wait. Effective March 8, 2000, the special circumstance was amended to require that the murder be committed "by means of" lying in wait. Use this instruction only for homicides alleged to have occurred prior to March 8, 2000. (See *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1007 ["while lying in wait" distinguished from "by means of lying in wait"]; *People v. Morales* (1989) 48 Cal.3d 527, 558.)

For cases after March 8, 2000, use Instruction 729SC, Special Circumstances: Lying in Wait—After March 8, 2000, Pen. Code, § 190.2(a)(15). (*People v. Michaels* (2002) 28 Cal.4th 486, 516–517 [noting amendment to statute].)

Give the bracketed definition of deliberation and premeditation if those terms are not defined in another instruction.

Give the bracketed paragraph stating that physical concealment is not required if the evidence shows that the decedent was aware of the defendant's presence. (*People v. Morales* (1989) 48 Cal.3d 527, 554–556.) Give the bracketed paragraph stating that concealment may be accomplished by ambush if the evidence shows an attack from a hidden position.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(15)(before March 8, 2000).
While Lying in Wait ▸ *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1007; *People v. Morales* (1989) 48 Cal.3d 527, 558; *People v. Michaels* (2002) 28 Cal.4th 486, 516–517.
Physical Concealment Not Required ▸ *People v. Morales* (1989) 48 Cal.3d 527, 554–556.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 445.

RELATED ISSUES

Dual Purpose
"[I]f a person lies in wait intending first to rape and second to kill, then immediately proceeds to carry out that intent (or attempts to rape, then kills), the elements of the lying-in-wait special circumstance are met." (*People v. Carpenter* (1997) 15 Cal.4th 312, 389.)

STAFF NOTES

Pen. Code, § 190.2(a), in relevant part, prior to March 8, 2000, amendments:

> (15) The defendant intentionally killed the victim while lying in wait.

The amendments effective March 8, 2000, substituted the phrase “by means of” in place of the word “while.”

While Lying in Wait

> Section 189 provides that a murder "perpetrated by means of" lying in wait is first degree murder. Section 190.2, subdivision (a)(15), however, describes the lying-in-wait special circumstance as the commission of an intentional murder "*while* lying in wait." (Italics added.) [*Domino* v. *Superior Court* (1982) 129 Cal.App.3d 1000, 1007] held that the use of the word "while" in the latter provision indicated that a closer temporal proximity was required than needed to prove mere lying-in-wait murder. As *Domino* stated, "the killing must take place during the period of concealment and watchful waiting *or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends*. If a cognizable interruption separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the ultimate penalty do not exist." (129 Cal.App.3d at p. 1011, italics added.)

(*People v. Morales* (1989) 48 Cal.3d 527, 558.)

> According to defendant, the special circumstance of lying in wait has an immediacy requirement. (*See Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 907; *Domino v. Superior Court* (1982) 129 Cal. App. 3d 1000, 1011, 181 Cal. Rptr. 486.) That requirement is set out in CALJIC No. 8.81.15, which was given to the jury in this case: "For a killing to be perpetrated while lying in wait, both the concealment and watchful waiting as well as the killing must occur in the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends. If there is a clear interruption separating the period of lying in wait from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of uninterrupted lethal events, the special

> circumstance is not proved." Defendant maintains that the facts here show a "cognizable interruption" (*People v. Morales, supra*, 48 Cal. 3d at p. 558) between the period of concealment and watchful waiting and the killing.
>
> If the only interruption was the time required for defendant and Popik to emerge from their hiding place, cross the apartment building parking lot, and enter the victim's apartment, that interruption would not preclude application of the special circumstance of lying in wait. The victim's death would have followed in a continuous flow from the concealment and watchful waiting. The special circumstance of lying in wait does not require that the defendant strike his blow from the place of concealment. (*People v. Hardy, supra,* 2 Cal. 4th 86, 164.)
>
> That defendant and Popik waited a half-hour or more after the victim's apartment lights went out, until Paulk arrived in the getaway car, does not preclude the special circumstance of lying in wait. "As long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking the victim by surprise." (*People v. Ceja* (1993) 4 Cal. 4th 1134, 1145, 847 P.2d 55, 17 Cal. Rptr. 2d 375.)

(*People v. Michaels* (2002) 28 C.4th 486, 516-517 [footnote omitted].)

Physical Concealment Not Required

> The cases have indicated that physical concealment from, or an actual ambush of, the victim is not a necessary element of the offense of lying-in-wait murder. [. . .]
>
> The concealment element may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares *even though he sees his murderer*. [. . .]
>
> The concealment which is required [for the lying-in-wait special circumstance], is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise. It is sufficient that a defendant's true intent and purpose were concealed

> by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim. [. . .]

(*People v. Morales* (1989) 48 Cal.3d 527, 554-556 [citations and quotation marks omitted, emphasis in original]; *see also People v. Edwards* (1991) 53 Cal.3d 787, 822-823.)

Concealment of Purpose Alone Insufficient-- Watchful Waiting Must Precede Attack

> *If a period of watchful waiting is shown* which immediately precedes the assault, a concealment of purpose, coupled with a surprise attack from a position of advantage, will satisfy the concealment element in lying-in-wait murder. [. . .]
>
> We believe that an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from "ordinary" premeditated murder to justify treating it as a special circumstance.

(*People v. Morales* (1989) 48 Cal.3d 527, 556-557 [emphasis in original]; *see also People v. Roberts* (1992) 2 C.4th 271, 322; *People v. Sims* (1993) 5 C.4th 405, 432-434.)

Time Period Similar to Deliberation and Premeditation

> Defendant challenges the language stating that the duration of the lying in wait must be "such as to show a state of mind equivalent to premeditation *or* deliberation." (Italics added.) We have upheld this language both for lying-in-wait murder (*People v. Stanley* (1995) 10 Cal. 4th 764, 794; *People v. Ruiz*, *supra*, 44 Cal. 3d at pp. 614-615) and the special circumstance (*People v. Sims*, *supra*, 5 Cal. 4th at p. 434; *People v. Hardy*, *supra*, 2 Cal. 4th at pp. 162-163, 191; *People v. Edwards*, *supra*, 54 Cal. 3d at p. 845), and we continue to do so.

(*People v. Carpenter* (1997) 15 Cal.4th 312, 390-391.)

Special Circumstance is Constitutional

"We are satisfied that the lying-in-wait special circumstance provides a "principled way to distinguish this case" from other first degree murders and thus comports with the Eighth Amendment requirements . . . ." (*People v. Edelbacher* (1989) 47 C.3d 983, 1022, 1023.)

Distinguished from First Degree Murder by Lying in Wait

> Murder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death. [Citations, footnote] In contrast, the lying-in-wait special circumstance requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . ." [Citations.] Furthermore, the lying-in-wait special circumstance requires "that the killing take place *during the period of concealment and watchful waiting*, an aspect of the special circumstance distinguishable from a murder perpetrated by means of lying in wait, or following premeditation and deliberation." [Citations.]

(*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1048-1049.)

729SC. Special Circumstances: Lying in Wait—After March 7, 2000, Pen. Code, § 190.2(a)(15)

The defendant is charged with the special circumstance of murder committed by means of lying in wait.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intentionally killed** _____ *<insert name[s] or description[s] of decedent[s]>***.**

AND

2. **The defendant committed the murder by means of lying in wait.**

A person commits a murder by means of lying in wait if:

1. **(He/She) concealed (his/her) purpose from the person killed.**

2. **(He/She) waited and watched for an opportunity to act.**

3. **Then (he/she) made a surprise attack on the person killed from a position of advantage.**

AND

4. **(He/She) intended to kill the person by taking the person by surprise.**

The lying in wait does not need to continue for any particular period of time, but its duration must show a state of mind equivalent to deliberation or premeditation. [A person acts with *deliberation* or *premeditation* if, before acting, the person carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act.]

[A person may conceal his or her purpose even though the person killed is aware of the person's physical presence.]

[The concealment may be accomplished by ambush or some other secret plan.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

Effective March 8, 2000, the special circumstance was amended to require that the murder be committed "by means of" lying in wait rather than "while" lying in wait. (*People v. Michaels* (2002) 28 Cal.4th 486, 516–517 [noting amendment to statute]; *People v. Superior Court of San Diego County (Bradway)* (2003) 105 Cal.App.4th 297, 309 [holding amended statute is not unconstitutionally vague].) Use this instruction for cases in which the alleged homicide occurred on or after March 8, 2000.

Give the bracketed definition of deliberation and premeditation if those terms are not defined in another instruction.

Give the bracketed paragraph stating that physical concealment is not required if the evidence shows that the decedent was aware of the defendant's presence. (*People v. Morales* (1989) 48 Cal.3d 527, 554–556.) Give the bracketed paragraph stating that concealment may be accomplished by ambush if the evidence shows an attack from a hidden position.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(15).
Amended Statute Not Unconstitutionally Vague ▸ *People v. Superior Court of San Diego County (Bradway)* (2003) 105 Cal.App.4th 297, 309.
Physical Concealment Not Required ▸ *People v. Morales* (1989) 48 Cal.3d 527, 554–556.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 445.

RELATED ISSUES

Dual Purpose
"[I]f a person lies in wait intending first to rape and second to kill, then immediately proceeds to carry out that intent (or attempts to rape, then kills), the

elements of the lying-in-wait special circumstance are met." (*People v. Carpenter* (1997) 15 Cal.4th 312, 389.)

STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

> (15) The defendant intentionally killed the victim by means of lying in wait.

Amended Statute Not Unconstitutionally Vague

Currently, only one published case has addressed the constitutionality of the amended lying in wait special circumstance. (*People v. Superior Court of San Diego (Bradway)* (2003) 105 Cal.App.4th 297, 309.) In *Bradway, supra*, the defendant was charged with the amended special circumstance but the prosecution did not seek the death penalty. The defendant challenged the statute as unconstitutionally vague under the Due Process Clause. However, he was not able to press an Eighth Amendment challenge. (*Ibid*.) Thus, no court has yet ruled on whether the amended statute provides a sufficient basis for distinguishing death eligible murderers from non-death eligible murderers.

In finding the amended statute is not unconstitutionally vague, the court began by reviewing the legislative history of the amendment:

> Proposition 18, adopted by the voters on March 7, 2000, changed the word "while" in the lying-in-wait special circumstance to "by means of" so that it would conform with the lying-in-wait language defining first degree murder to essentially eliminate the immediacy requirement that case law had placed on the special circumstance. (See Legis. Analyst's analysis of Prop. 18, Mar. 7, 2000 Ballot Pamphlet; Chief Counsel, Rep. on Sen. Bill 1878 to Assem. Comm. on Public Safety, June 23, 1998 hearing, pp. 10-11.) The Legislative Analyst's analysis of Proposition 18 in the ballot pamphlet noted that the courts had "generally interpreted while lying in wait to mean that, in order to qualify as a special circumstance, a murder must have occurred immediately upon a confrontation between the murderer and the victim. The courts have generally interpreted this provision to rule out a finding of a special circumstance if the defendant waited for the victim, captured the victim, transported the victim to another location, and then committed the murder." (Legis. Analyst's analysis of Prop. 18, Mar. 7, 2000 Ballot Pamphlet.) The analysis further stated:
>
> "This measure amends state law so that a case of first degree murder is eligible for a finding of a special circumstance if the murderer

> intentionally killed the victim 'by means of lying in wait.' In so doing, this measure replaces the current language establishing a special circumstance for murders committed 'while lying in wait.' This change would permit the finding of a special circumstance not only in a case in which a murder occurred immediately upon a confrontation between the murderer and the victim, but also in a case in which the murderer waited for the victim, captured the victim, transported the victim to another location, and then committed the murder." (*Ibid*.)
>
> In the June 23, 1998 report on Senate Bill 1878 by chief counsel to the Assembly Committee on Public Safety, it was noted that in *Morales, supra,* 48 Cal.3d 527 and *Edelbacher, supra,* 47 Cal.3d 983, our Supreme Court had stated that as a constitutional matter an intentional killing committed by means of lying in wait was a valid basis to impose the death penalty and that in *Edelbacher* had held that first degree murder committed by means of lying in wait where the murder was committed with an intent to kill was a valid basis alone to impose the death sentence. (Chief Counsel, Rep. on Sen. Bill No. 1878 to Assem. Comm. on Public Safety, June 23, 1998 hearing, p. 10.) The report recognized the language of "while" in the special circumstance of lying in wait had been interpreted by the court in *Domino, supra,* 129 Cal. App. 3d 1000, to require the murder be committed during the time the person was lying in wait, that such view had been accepted by our Supreme Court, and that such current distinction between "the category of first-degree murder and the special circumstance has caused substantial confusion, particularly in the area of jury instructions." (Chief Counsel, Rep. on Sen. Bill No. 1878 to Assem. Comm. on Public Safety, June 23, 1998 hearing, p. 10.) The report thus recommended the change in the language in the lying-in-wait special circumstance to conform to that in section 189. (*Ibid*.)

(*People v. Superior Court of San Diego (Bradway), supra* 105 Cal.App.4th at pp. 307-308.)

The *Bradway* court then considered the argument that the statute was unconstitutionally vague by failing to meaningfully distinguish between an intentional first degree murder committed by lying in wait and a special circumstance murder by lying in wait. The court rejected this argument, stating:

> [E]ven after Proposition 18 changed the language of the lying-in-wait special circumstance to comport with the language of first degree murder "by means of" lying in wait, the special circumstance remains distinguishable because it still requires the specific intent to kill, whereas first degree murder by lying in wait does not.

(*Id.* at p. 309.)

Physical Concealment Not Required

> The cases have indicated that physical concealment from, or an actual ambush of, the victim is not a necessary element of the offense of lying-in-wait murder. [. . .]
>
> The concealment element may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares *even though he sees his murderer*. [. . .]
>
> The concealment which is required [for the lying-in-wait special circumstance], is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise. It is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim. [. . .]

(*People v. Morales* (1989) 48 Cal.3d 527, 554-556 [citations and quotation marks omitted, emphasis in original]; see also *People v. Edwards* (1991) 53 Cal.3d 787, 822-823.)

Concealment of Purpose Alone Insufficient-- Watchful Waiting Must Precede Attack

> *If a period of watchful waiting is shown* which immediately precedes the assault, a concealment of purpose, coupled with a surprise attack from a position of advantage, will satisfy the concealment element in lying-in-wait murder. [. . .]
>
> We believe that an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an

> unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from "ordinary" premeditated murder to justify treating it as a special circumstance.

(*People v. Morales* (1989) 48 Cal.3d 527, 556-557 [emphasis in original]; see also *People v. Roberts* (1992) 2 C.4th 271, 322; *People v. Sims* (1993) 5 C.4th 405, 432-434.)

Time Period Similar to Deliberation and Premeditation

> Defendant challenges the language stating that the duration of the lying in wait must be "such as to show a state of mind equivalent to premeditation *or* deliberation." (Italics added.) We have upheld this language both for lying-in-wait murder (*People v. Stanley* (1995) 10 Cal. 4th 764, 794; *People v. Ruiz*, *supra*, 44 Cal. 3d at pp. 614-615) and the special circumstance (*People v. Sims*, *supra*, 5 Cal. 4th at p. 434; *People v. Hardy*, *supra*, 2 Cal. 4th at pp. 162-163, 191; *People v. Edwards*, *supra*, 54 Cal. 3d at p. 845), and we continue to do so.

(*People v. Carpenter* (1997) 15 Cal.4th 312, 390-391.)

Pre-March 8, 2000: Distinguished from First Degree Murder by Lying in Wait

> Murder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death. [Citations, footnote] In contrast, the lying-in-wait special circumstance requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . ." [Citations.] Furthermore, the lying-in-wait special circumstance requires "that the killing take place *during the period of concealment and watchful waiting*, an aspect of the special circumstance distinguishable from a murder perpetrated by means of lying in wait, or following premeditation and deliberation." [Citations.]

(*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1048-1049.)

730SC. Special Circumstances: Murder Because of Race, Religion, or Nationality Pen. Code, § 190.2(a)(16)

The defendant is charged with the special circumstance of murder committed because of the deceased's (race[,]/ color[,]/ religion[,]/ nationality[,]/ [or] country of origin).

To prove that this special circumstance is true, the People must prove that:

1. **(The defendant/**_____ *<insert name or description of principal if not defenant>***) intentionally killed** _____ *<insert name[s] or description[s] of decedent[s]>***.**

AND

2. **The defendant intended that** _____ *<insert name[s] or description[s] of decedent[s]>* **be killed because the defendant was biased against** _____**'s** *<insert name[s] or description[s] of decedent[s]>* **(race[,]/ color[,]/ religion[,]/ nationality[,]/ [or] country of origin).**

The defendant's bias must have caused (him/her) to (commit/participate in/aid and abet) the murder. If the defendant had more than one reason to (commit/participate in/aid and abet) the murder, (his/her) bias must have been a substantial factor motivating (his/her) conduct. A *substantial factor* is more than a trivial or remote factor, but it does not need to be the only factor that motivated the defendant.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(16).

Special Circumstance Constitutional ▸ *People v. Sassounian* (1986) 182 Cal.App.3d 361, 413; *People v. Talamantez* (1985) 169 Cal.App.3d 443, 469.

"Because of" Defined ▸ Pen. Code, § 190.03(c); *People v. Superior Court (Aishman)* (1995) 10 Cal.4th 735, 741; *In re M.S.* (1995) 10 Cal.4th 698, 719–720.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 449.

STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

> (16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.

"Because Of"

The Supreme Court explained the phrase "because of" as used in hate crimes statutes in *In Re M.S.* (1995) 10 Cal.4th 698, 719–720:

> By employing the phrase "because of" in section 422.6 and 422.7, the Legislature has simply dictated the bias motivation must be a cause in fact of the offense, whether or not other causes also exist. [Citations.] When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the crime.

Justice Kennard defined "cause in fact" in her concurring opinion (*Id.* at pp. 731–732):

> When a person has acted to deprive another of civil rights, and the evidence reveals both bias and nonbias motives, the bias motives will be a "cause in fact" of the conduct if either (1) the conduct would not have occurred in the absence of the bias motives, or (2) the bias and nonbias motives are independent of each other and the bias motives would have been sufficient to produce the conduct even in the absence of all nonbias motives.

"Nationality" and "Country of Origin" Not Vague

> The special circumstance with which the defendant was charged, was that he intentionally killed Arikan, because of his nationality and country of origin, in that he "was a Turkish National, within the meaning of Penal Code section 190.2, subdivision (a)(16)." There is nothing so vague about those terms as would require men of "common intelligence" to have to guess at their meaning or be in disagreement about their application to the facts of this case.

(*People v. Sassounian* (1986) 182 Cal.App.3d 361, 413.)

731SC. Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17)

The defendant is charged with the special circumstance of murder committed while engaged in the commission of _____ <*insert name of felony from Pen. Code, § 190.2(a)(17)*>**.**

To prove that this special circumstance is true, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) _____** <*insert felony from Pen. Code, § 190.2(a)(17)*>**.**

AND

2. _____ <*insert name[s] or description[s] of decedent[s]*> **(was/were) (killed/fatally injured) (while the defendant was engaged in the commission [or attempted commission] of _____** <*insert felony from Pen. Code, § 190.2(a)(17)*>**[,]/ [or] while the defendant was aiding and abetting the commission [or attempted commission] of _____** <*insert felony from Pen. Code, § 190.2(a)(17)*>**[,]/ [or] while the defendant was a member of a conspiracy to commit _____** <*insert felony from Pen. Code, § 190.2(a)(17)*>**[,]/ [or] during the defendant's immediate flight after committing [or attempting to commit] _____** <*insert felony from Pen. Code, § 190.2(a)(17)*>**).**

[The defendant committed [or attempted to commit] _____ <*insert felony*> **if:**

<*INSERT THE NUMBERED ELEMENTS OF THE UNDERLYING FELONY.*>**]**

[The defendant (aided and abetted/was a member of a conspiracy to commit) _____ <*insert felony*> **if:**

<*INSERT THE NUMBERED ELEMENTS OF AIDING AND ABETTING OR CONSPIRACY AND THE ELEMENTS OF THE UNDERLYING FELONY.*>**]**

[In order for this special circumstance to be true, the People must prove that the defendant intended to commit _____ <*insert felony*> independent of the killing of _____ <*insert name[s] or description[s] of decedent[s]*>. If the defendant intended solely to commit murder and the commission of _____ <*insert felony*> was merely part of or incidental to the commission of that murder, then the special circumstance is not proved.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

The court has a **sua sponte** duty to instruct on the elements of the felony alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) Use either the bracketed paragraph beginning, "The defendant committed [or attempted to commit] . . .," or the bracketed paragraph beginning, "The defendant (aided and abetted/ was a member of a conspiracy to commit) . . .."

Give the bracketed paragraph stating that the felony must be independent of the murder if the evidence supports a reasonable inference that the felony was committed merely to facilitate the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61; *People v. Clark* (1990) 50 Cal.3d 583, 609; *People v. Kimble* (1988) 44 Cal.3d 480, 501; *People v. Navarette* (2003) 30 Cal.4th 458, 505.)

The court has a **sua sponte** duty to instruct on the duration of the felony if the prosecution is pursuing a felony-murder theory. (See *People v. Fields* (1983) 35 Cal.3d 329, 363–364; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299.) Give Instruction 738, Felony Murder: During Commission of Felony—Defined, with this instruction.

Give this instruction for each felony-based special circumstance charged. For example, if the defendant is charged with a special circumstance for rape and for robbery, read the instruction once for the rape charge and once for the robbery charge.

Proposition 115 added Penal Code section 190.41, eliminating the corpus delicti rule for the felony-murder special circumstance. (Pen. Code, § 190.41; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298.) If, however, the alleged homicide predates the effective date of the statute (June 6, 1990), then the court must modify

this instruction to require proof of the corpus delicti of the underlying felony independent of the defendant's extrajudicial statements. (*Tapia v. Superior Court, supra,* 53 Cal.3d at p. 298.)

If the alleged homicide occurred between 1983 and 1987 (the window of time between *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 135, and *People v. Anderson* (1987) 43 Cal.3d 1104, 1147), then the prosecution must also prove intent to kill on the part of the actual killer. (*People v. Bolden* (2002) 29 Cal.4th 515, 560; *People v. Mendoza* (2000) 24 Cal.4th 130, 182.) The court should then modify this instruction to specify intent to kill as an element.

Sample Elements of Felony to Insert—Robbery

The defendant committed robbery if:

1. The defendant took property that was not (his/her) own.

2. The property was taken from another person's possession and immediate presence.

3. The property was taken against that person's will.

4. The defendant used force or fear to take the property or to prevent the person from resisting.

AND

5. When the defendant used force or fear to take the property, (he/she) intended (to deprive the owner of it permanently/ [or] to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).

Related Instructions

Instruction 738, Felony Murder: During Commission of Felony—Defined.
Instruction 703SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(17).

Felony Cannot Be Incidental to Murder ‣ *People v. Green* (1980) 27 Cal.3d 1, 61 [disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3]; *People v. Mendoza* (2000) 24 Cal.4th 130, 182.

Instruction on Felony as Incidental to Murder ‣ *People v. Kimble* (1988) 44 Cal.3d 480, 501; *People v. Clark* (1990) 50 Cal.3d 583, 609; *People v. Navarette* (2003) 30 Cal.4th 458, 505.

Felony Continues Until Temporary Place of Safety ‣ *People v. Fields* (1983) 35 Cal.3d 329, 364–368; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026.

Provocative Act Murder ‣ *People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081.

Concurrent Intent ‣ *People v. Mendoza* (2000) 24 Cal.4th 130, 183; *People v. Clark* (1990) 50 Cal.3d 583, 608–609.

Proposition 115 Amendments to Special Circumstance ‣ *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, §§ 450, 451, 452, 453.

RELATED ISSUES

Applies to Felony Murder and Provocative Act Murder

"The fact that the defendant is convicted of murder under the application of the provocative act murder doctrine rather than pursuant to the felony-murder doctrine is irrelevant to the question of whether the murder qualified as a special-circumstances murder under former section 190.2, subdivision (a)(17). The statute requires only that the murder be committed while the defendant was engaged in the commission of an enumerated felony." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 596 [citing *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1081].)

Concurrent Intent to Kill and Commit Felony

"Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*People v. Mendoza* (2000) 24 Cal.4th 130, 183; *People v. Clark* (1990) 50 Cal.3d 583, 608–609.)

Multiple Special Circumstances May Be Alleged

The defendant may be charged with multiple felony-related special circumstances based on multiple felonies committed against one victim or multiple victims to one felony. (*People v. Holt* (1997) 15 Cal.4th 619, 682; *People v. Andrews* (1989) 49 Cal.3d 200, 225–226.)

STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

> (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:
>
> (A) Robbery in violation of Section 211 or 212.5.
>
> (B) Kidnapping in violation of Section 207, 209, or 209.5.
>
> (C) Rape in violation of Section 261.
>
> (D) Sodomy in violation of Section 286.
>
> (E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288.
>
> (F) Oral copulation in violation of Section 288a.
>
> (G) Burglary in the first or second degree in violation of Section 460.
>
> (H) Arson in violation of subdivision (b) of Section 451.
>
> (I) Train wrecking in violation of Section 219.
>
> (J) Mayhem in violation of Section 203.
>
> (K) Rape by instrument in violation of Section 289.
>
> (L) Carjacking, as defined in Section 215.
>
> (M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

Pen. Code, § 190.41:

> Notwithstanding Section 190.4 or any other provision of law, the corpus delicti of a felony-based special circumstance enumerated in paragraph (17) of subdivision (a) of Section 190.2 need not be proved independently of a defendant's extrajudicial statement.

Felony Cannot be Incidental to Murder

In *People v. Green* (1980) 27 Cal.3d 1, 61 (disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3), the court established the rule that the felony cannot be incidental to the commission of the murder. Interpreting the previous version of Penal Code section 190.2(a)(17), which used the phrase "during the commission of" in place of the words "while engaged in," the court stated:

> [A] valid conviction of a listed crime was a necessary condition to finding a corresponding special circumstance, but it was not a sufficient condition: the murder must also have been committed 'during the commission' of the underlying crime. [. . .]

(*People v. Green, supra,* 27 Cal.3d 1 at p. 59.) The court continued:

> [T]he Legislature [in enacting section 190.2] must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. [. . .]
>
> The Legislature's goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder--'a second thing to it,' as the jury foreman here said--because its sole object is to facilitate or conceal the primary crime.

(*Id.* at p. 61 [citations omitted].)

The court later summarized this rule as follows:

> [T]o prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder.

(*People v. Mendoza* (2000) 24 Cal.4th 130, 182 [citations omitted].)

Instruction on Felony Incidental to Murder

When the evidence supports the inference that the felony was incidental to the murder or was committed solely for the purpose of committing murder, it is error not to instruct the jury on the *Green* principle. (*People v. Clark* (1990) 50 Cal.3d 583, 609.)

However, the court later held that the *Green* case did not create a new "element" of the special circumstance that must be instructed on in every case:

> [W]e reject the dissent's novel suggestion that *Green*'s clarification of the scope of felony-murder special circumstances has somehow become an 'element' of such special circumstances, on which the jury must be instructed in all cases regardless of whether the evidence supports such an instruction. Our cases have never treated *Green* in this fashion. [Citations.] Nor have we so treated other 'clarifying' holdings in analogous settings. [Citations.] These cases disclose that the mere act of 'clarifying' the scope of an element of a crime or a special circumstance does not create a new and separate element of that crime or special circumstance.

(*People v. Kimble* (1988) 44 Cal.3d 480, 501.)

The *Kimble* court concluded that the trial court did not have a sua sponte duty to instruct the jury that the felony could not be incidental to the murder because "there was abundant evidence that the rape and robberies were not 'incidental' to the murders." (*Id*. at p. 503.) The court held that, given the state of the evidence, the defense was required to request a clarifying instruction. (*Ibid.*)

The trial in *Kimble, supra,* predated the *Green* decision. The *Kimble* court also noted,

> CALJIC No. 8.81.17, paragraph 3, incorporates the *Green* holding. Presumably trial courts have given this instruction as a matter of course in post-*Green* trials. Nothing in our opinion today is intended to discourage such a practice.

(*Ibid.* at n.16.)

The court reached a similar ruling in *People v. Navarette* (2003) 30 Cal.4th 458, 505, stating:

> The second paragraph of CALJIC No. 8.81.17 is appropriate where the evidence suggests the defendant may have intended to murder his victim without having an independent intent to commit the felony that forms the basis of the special circumstance allegation. In other words, if the felony is merely incidental to achieving the murder--the murder being the defendant's primary purpose--then the special circumstance is not present, but if the defendant has an 'independent felonious purpose' (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present. [Citations].
>
> Here, the record includes no significant evidence of any motive for the murders other than burglary and/or robbery [. . . .] [T]he record does not include any evidence (other than the brutality of the crimes) that defendant had an unconscious hatred for women, and defendant did nothing to develop this theory of the case at trial, making only a passing speculative reference to this theory at closing argument. Defendant's primary defense at trial was that he was too intoxicated to act with intent. Under the circumstances of the case as presented to the jury, the second paragraph of CALJIC No. 8.81.17 was not required.

The Court of Appeals recently applied these holdings in *People v. Harden* (2003) 2 Cal.Rptr.3d 105, 117:

> We conclude *Navarette*, together with *Kimble* and *Mendoza*, are binding precedent setting forth the principle that paragraph 2 of CALJIC No. 8.81.17 may be omitted by a trial court *if* the evidence does not support a reasonable inference (or, in other words, a rational jury would not conclude) that commission of the felony other than murder was merely incidental to the primary goal of murder.

The court noted, however, that the by failing to require this instruction, the Supreme Court left open potential constitutional difficulties by conflating felony-murder with the felony-murder special circumstance:

> We acknowledge the merit of Harden's contention that there must be a distinction between felony murder and the felony-murder special circumstance. However, we are bound to follow precedent established by the California Supreme Court. In *Green*, that court discussed *Furman* and *Gregg* and referred to the Legislature's apparent cognizance of the need for such a distinction. However, in *Green*'s progeny, the California Supreme Court has concluded paragraph 2 of CALJIC No. 8.81.17 is not required to be given if the evidence does not support a reasonable inference that the felony other than murder was merely incidental to the primary goal of murder. In deciding those cases, we presume the California Supreme Court was aware of the constitutional issue it previously discussed in *Green*, even though that issue was not expressly discussed in those subsequent cases. We therefore infer the California Supreme Court has implicitly concluded omission of paragraph 2 of CALJIC No. 8.81.17 does not violate the Eighth Amendment in cases in which the evidence does not support a reasonable inference that the other felony was merely incidental to the primary goal of murder. Accordingly, if the omission of paragraph 2 violates the Eighth Amendment, Harden must seek review of that issue by the California Supreme Court.

(*People v. Harden, supra,* 2 Cal.Rptr.3d at p. 119.)

"While Engaged in" Sufficiently Clear

> Defendant now contends that the court erred by failing to define the phrase "while engaged in" sua sponte. The court did not err. When, as here, a phrase "is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request."

(*People v. Rowland* (1992) 4 Cal.4th 238, 270-271 [citations omitted]; *People v. Guzman* (1988) 45 Cal.3d 915, 950.)

"During" Equivalent to "While Engaged in"

> [W]e perceive no substantial difference between the two statutory phrases, "during the commission of," and "while engaged in the commission of." The words "during" and "while," in this context, reasonably appear to mean the same thing.

(*People v. Guzman* (1988) 45 Cal.3d 915, 950.)

Felony Continues Until Reaches Temporary Place of Safety

As with felony murder, in determining whether the defendant was "engaged in" the felony at the time of the murder, the Supreme Court has held that the felony continues until the defendant reaches a temporary place of safety. (*People v. Fields* (1983) 35 Cal.3d 329, 364-368.) In *People v. Fields, supra,* the defendant forced the victim to write a check then kept the victim in his home while a codefendant cashed the check and returned with money. The court observed that, although the defendant has in his own home with the proceeds of the robbery,

> That residence, however, was not a place of safety so long as [the victim] was held prisoner. [Citation.] In an unguarded moment, she might escape, notify the police, and render the Fields residence quite unsafe for defendant. In order to complete a successful escape with the robbery proceeds, defendant either had to dispose of her, which he did, or flee to some other place which she could not identify for the police.

(*Id.* at pp. 367-368; see also *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025-1026; *People v. Silva* (1988) 45 Cal.3d 604, 632 [kidnapping continued while victim detained].)

Similarly, the court held in *People v. Guzman* (1988) 45 Cal.3d 915, 952, that the crime of rape continued, "so long as the victim had not been disposed of or confined."

732ASC. Special Circumstances: Murder in Commission of Felony—Kidnapping With Intent to Kill, Pen. Code, § 190.2(a)(17)

The defendant is charged with the special circumstance of intentional murder while engaged in the commission of kidnapping.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) kidnapping.**

2. **_____** *<insert name[s] or description[s] of decedent[s]>* **(was/were) (killed/fatally injured) (while the defendant was engaged in the commission [or attempted commission] of kidnapping[,]/ [or] while the defendant was aiding and abetting the commission [or attempted commission] of kidnapping[,]/ [or] while the defendant was a member of a conspiracy to commit kidnapping[,]/ [or] during the defendant's immediate flight after committing [or attempting to commit] kidnapping).**

AND

3. **(The defendant/_____** *<insert name or description of principal>***) intended (to kill _____** *<insert name[s] or description[s] of decedent[s]>***/that _____** *<insert name[s] or description[s] of decedent[s]>* **be killed).**

[The defendant committed [or attempted to commit] kidnapping if:

*<INSERT THE NUMBERED ELEMENTS OF THE SPECIFIC KIDNAPPING CHARGE ALLEGED UNDER PEN. CODE, §§ 207, 209, OR 209.5.>***]**

[The defendant (aided and abetted/was a member of a conspiracy to commit) kidnapping if:

<INSERT THE NUMBERED ELEMENTS OF AIDING AND ABETTING OR CONSPIRACY AND THE ELEMENTS OF THE SPECIFIC

KIDNAPPING CHARGE ALLEGED UNDER PEN. CODE, §§ 207, 209, OR 209.5.>**]**

[If all of the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of kidnapping was merely part of or incidental to the commission of that murder.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

The court has a **sua sponte** duty to instruct on the elements of the felony alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) Use either the bracketed paragraph beginning, "The defendant committed [or attempted to commit] . . .," or the bracketed paragraph beginning, "The defendant (aided and abetted/ was a member of a conspiracy to commit) . . .."

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61, to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with Instruction 731SC, Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17). When giving this instruction with Instruction 731SC, give the final bracketed paragraph.

The court has a **sua sponte** duty to instruct on the duration of the felony if the prosecution is pursuing a felony-murder theory. (See *People v. Fields* (1983) 35 Cal.3d 329, 363–364; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299.) Give Instruction 738, Felony Murder: During Commission of Felony—Defined, with this instruction.

The statute does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on a principal who intended to kill even if the defendant did not. (See Pen. Code, § 190.2(a)(17)(M).) The instruction has been drafted to provide the court with both alternatives in element 3.

Related Instructions

Instruction 738, Felony Murder: During Commission of Felony—Defined.

Instruction 703SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).
Instruction 731SC, Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17).
Instruction 950, Kidnapping.
Instruction 951, Kidnapping: For Child Molestation.
Instruction 952, Kidnapping: Person Incapable of Consent.
Instruction 955, Kidnapping: For Ransom, Reward, or Extortion.
Instruction 956, Kidnapping: For Robbery, Rape, or Other Sex Offenses.
Instruction 957, Kidnapping During Carjacking.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(17)(B), (H) & (M).
Felony Continues Until Temporary Place of Safety ▸ *People v. Fields* (1983) 35 Cal.3d 329, 364–368; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 450.

STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

> (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [. . .]
>
> (B) Kidnapping in violation of Section 207, 209, or 209.5. [. . .]
>
> (H) Arson in violation of subdivision (b) of Section 451. [. . .]
>
> (M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

Felony Continues Until Reaches Temporary Place of Safety

As with felony murder, in determining whether the defendant was "engaged in" the felony at the time of the murder, the Supreme Court has held that the felony continues until the defendant reaches a temporary place of safety. (*People v. Fields* (1983) 35 Cal.3d 329, 364-368.) In *People v. Fields, supra,* the defendant forced the victim to write a check then kept the victim in his home while a codefendant cashed the check and returned with money. The court observed that, although the defendant has in his own home with the proceeds of the robbery,

> That residence, however, was not a place of safety so long as [the victim] was held prisoner. [Citation.] In an unguarded moment, she might escape, notify the police, and render the Fields residence quite unsafe for defendant. In order to complete a successful escape with the robbery proceeds, defendant either had to dispose of her, which he did, or flee to some other place which she could not identify for the police.

(*Id.* at pp. 367-368; see also *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025-1026; *People v. Silva* (1988) 45 Cal.3d 604, 632 [kidnapping continued while victim detained].)

Similarly, the court held in *People v. Guzman* (1988) 45 Cal.3d 915, 952, that the crime of rape continued "so long as the victim had not been disposed of or confined."

732BSC. Special Circumstances: Murder in Commission of Felony—Arson With Intent to Kill, Pen. Code, § 190.2(a)(17)

The defendant is charged with the special circumstance of intentional murder while engaged in the commission of arson of an inhabited structure.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) arson of an inhabited structure.**

2. **_____** *<insert name[s] or description[s] of decedent[s]>* **(was/were) (killed/fatally injured) (while the defendant was engaged in the commission [or attempted commission] of the arson[,]/ [or] while the defendant was aiding and abetting the commission [or attempted commission] of the arson[,]/ [or] while the defendant was a member of a conspiracy to commit the arson[,]/ [or] during the defendant's immediate flight after committing [or attempting to commit] the arson).**

AND

3. **(The defendant/_____** *<insert name or description of principal>***) intended (to kill _____** *<insert name[s] or description[s] of decedent[s]>***/that _____** *<insert name[s] or description[s] of decedent[s]>* **be killed).**

[The defendant committed [or attempted to commit] arson of an inhabited structure if:

*<INSERT THE NUMBERED ELEMENTS OF ARSON OF AN INHABITED STRUCTURE FROM INSTRUCTION 1055.>***]**

[The defendant (aided and abetted/was a member of a conspiracy to commit) arson of an inhabited structure if:

<INSERT THE NUMBERED ELEMENTS OF AIDING AND ABETTING OR CONSPIRACY, AS WELL AS THE ELEMENTS OF ARSON OF AN INHABITED STRUCTURE FROM INSTRUCTION 1055.>

[If all of the listed elements are proved, you may find this special circumstance true even if the defendant intended solely to commit murder and the commission of arson was merely part of or incidental to the commission of that murder.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

The court has a **sua sponte** duty to instruct on the elements of the felony alleged. (*People v. Cain* (1995) 10 Cal.4th 1, 36.) Use either the bracketed paragraph beginning, "The defendant committed [or attempted to commit] . . .," or the bracketed paragraph beginning, "The defendant (aided and abetted/ was a member of a conspiracy to commit) . . .."

Subparagraph (M) of Penal Code section 190.2(a)(17) eliminates the application of *People v. Green* (1980) 27 Cal.3d 1, 61, to intentional murders during the commission of kidnapping or arson of an inhabited structure. The statute may only be applied to alleged homicides after the effective date, March 8, 2000. This instruction may be given alone or with Instruction 731SC, Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(1)(17). When giving this instruction with Instruction 731SC, give the final bracketed paragraph.

The court has a **sua sponte** duty to instruct on the duration of the felony if the prosecution is pursuing a felony-murder theory. (See *People v. Fields* (1983) 35 Cal.3d 329, 363–364; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299.) Give Instruction 738, Felony Murder: During Commission of Felony—Defined, with this instruction.

The statute does not specify whether the defendant must personally intend to kill or whether accomplice liability may be based on a principal who intended to kill even if the defendant did not. (See Pen. Code, § 190.2(a)(17)(M).) The instruction has been drafted to provide the court with both alternatives in element 3.

Related Instructions

Instruction 738, Felony Murder: During Commission of Felony—Defined.
Instruction 703SC, Special Circumstances: Intent Requirement for Accomplice After June 5, 1990—Felony Murder, Pen. Code, § 190.2(a)(17).

Instruction 731SC, Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(a)(17).
Instruction 1055, Arson: Inhabited Structure.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(17)(B), (H) & (M).
Felony Continues Until Temporary Place of Safety ▸ *People v. Fields* (1983) 35 Cal.3d 329, 364–368; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025–1026.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 450.

STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

> (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [. . .]
>
> (B) Kidnapping in violation of Section 207, 209, or 209.5. [. . .]
>
> (H) Arson in violation of subdivision (b) of Section 451. [. . .]
>
> (M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

Felony Continues Until Reaches Temporary Place of Safety

As with felony murder, in determining whether the defendant was "engaged in" the felony at the time of the murder, the Supreme Court has held that the felony continues until the defendant reaches a temporary place of safety. (*People v. Fields* (1983) 35 Cal.3d 329, 364-368.) In *People v. Fields, supra,* the defendant forced the victim to write a check then kept the victim in his home while a codefendant cashed the check and returned with money. The court observed that, although the defendant has in his own home with the proceeds of the robbery,

> That residence, however, was not a place of safety so long as [the victim] was held prisoner. [Citation.] In an unguarded moment, she might escape, notify the police, and render the Fields residence quite unsafe for defendant. In order to complete a successful escape with the robbery proceeds, defendant either had to dispose of her, which he did, or flee to some other place which she could not identify for the police.

(*Id.* at pp. 367-368; see also *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025-1026; *People v. Silva* (1988) 45 Cal.3d 604, 632 [kidnapping continued while victim detained].)

Similarly, the court held in *People v. Guzman* (1988) 45 Cal.3d 915, 952, that the crime of rape continued "so long as the victim had not been disposed of or confined."

733SC. Special Circumstances: Murder With Torture, Pen. Code, § 190.2(a)(18)

The defendant is charged with the special circumstance of murder involving the infliction of torture.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intended to kill** _____ *<insert name[s] or description[s] of decedent[s]>***.**

2. **The defendant also willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on** _____ *<insert name[s] or description[s] of decedent[s]>***.**

3. **The defendant intended to inflict such pain on** _____ *<insert name[s] or description[s] of decedent[s]>* **for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason.**

AND

<Alternative A—on or after June 6, 1990>

[4. The defendant did an act intended to inflict extreme pain on _____ *<insert name[s] or description[s] of decedent[s]>***.]**

<Alternative B—before June 6, 1990>

[4. The defendant in fact inflicted extreme physical pain on _____ *<insert name[s] or description[s] of decedent[s]>***.]**

There is no requirement that the person killed be aware of the pain.

[A person commits an act *willfully* when he or she does it willingly or on purpose. A person acts with *deliberation* or *premeditation* if, before acting, the person carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

In element 4, always give alternative 4A unless the homicide occurred prior to June 6, 1990. (*People v. Davenport* (1985) 41 Cal.3d 247, 271.) If the homicide occurred prior to June 6, 1990, give alternative 4B. For homicides after that date, alternative 4B should not be given. (*People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14.)

Give the bracketed paragraph defining deliberation and premeditation if those terms have not been defined in another instruction.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(18).
Must Specifically Intend to Torture ▸ *People v. Davenport* (1985) 41 Cal.3d 247, 265–266; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1255.
Causation Not Required ▸ *People v. Crittenden* (1994) 9 Cal.4th 83, 141–142.
Pain Not an Element ▸ *People v. Davenport* (1985) 41 Cal.3d 247, 271; *People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 446.

RELATED ISSUES

Causation Not Required for Special Circumstance
"[T]he prosecution was not required to prove that the acts of torture inflicted upon [the victim] were the cause of his death" in order to prove the torture-murder special circumstance. (*People v. Crittenden* (1994) 9 Cal.4th 83, 142.) Causation is required for first degree murder by torture. *(Ibid.)*

Instruction on Voluntary Intoxication
"[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242; see Instruction 709, Voluntary Intoxication: Effects on Homicide Crimes.)

Pain Not an Element

As with first degree murder by torture, all that is required for the special circumstance is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. Prior to June 6, 1990, the special circumstance stated "torture requires proof of the infliction of extreme physical pain." (Pre-June 6, 1990, Pen. Code, § 190.2(a)(18).) Proposition 115 eliminated this language. Thus, for all homicides after June 6, 1990, there is no requirement under the special circumstance that the victim actually suffer pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239; *People v. Davenport* (1985) 41 Cal.3d 247, 271; *People v. Crittenden* (1994) 9 Cal.4th 83, 140, fn. 14.)

STAFF NOTES

Pen. Code § 190.2(a), in relevant part:

> (18) The murder was intentional and involved the infliction of torture.

Defendant Must Intend to Inflict Torture

> [A] special circumstance which requires only an intentional killing in which the victim suffered extreme pain would be capable of application to virtually any intentional, first degree murder with the possible exception of those occasions on which the victim's death was instantaneous. Such a distinction may have nothing to do with the mental state or culpability of the defendant and would not seem to provide a principled basis for distinguishing capital murder from any other murder.

(*People v. Davenport* (1985) 41 Cal.3d 247, 265-266.)

> [W]e are compelled to conclude that the electorate which enacted subdivision (a)(18) intended to incorporate so much of the established judicial meaning of torture as is not inconsistent with the specific language of the enactment.
>
> Torture has been defined as the 'Act or process of inflicting severe pain, esp. as a punishment, in order to extort confession, or in revenge.' (Webster's New Internat. Dict. (2d Ed.).) The dictionary definition was appropriately enlarged upon by this court in its original opinion in *People* v. *Heslen*, 163 P.2d 21, 27 in the following words: 'Implicit in that definition is the requirement of an intent to cause pain and suffering in addition to death. That is, the killer is not satisfied with killing alone. He wishes to punish, execute vengeance on, or extort something from his victim, and in the course, or as the result of inflicting pain and suffering, the victim dies. . . .' (See disposition of that case on rehearing, 27 Cal.2d 52.).

(*Id.* at pp. 266-267 [citations omitted].)

> The very use of the term torture to describe the class of murders to which the subdivision applies necessarily imports into the statute a requirement that the perpetrator have the sadistic intent to cause the

> victim to suffer pain in addition to the pain of death, which intent is distinct from the intent to cause the victim's death.

(*Id.* at p. 271; see also *People v. Pensinger* (1991) 52 Cal.3d 1210, 1255 [failure to instruct on intent requirement of torture reversible error].)

Intent to Torture Must be Deliberate and Premeditated

> [T]he Legislature intended that the *means* by which the killing was accomplished be equated to the premeditation and deliberation which render other murders sufficiently reprehensible to constitute first degree murder. A murder by torture was and is considered among the most reprehensible types of murder *because of the calculated nature of the acts causing death*, not simply because greater culpability could be attached to murder in which great pain and suffering are caused to the victim.

(*People v. Davenport* (1985) 41 Cal.3d 247, 267 [emphasis in original].)

> It is possible to inflict severe and prolonged pain on another without deliberation or premeditation, but it may not be torture under section 189." (*People* v. *Steger, supra*, 16 Cal.3d 539, 546, fn. 2.)

(*Id.* at p. 269.)

In *People v. Crittenden* (1994) 9 Cal.4th 83, 138, the court held that the written instruction on the torture-murder special circumstance given by the trial court correctly stated the law. The instruction stated, in relevant part:

> 5. Further, the specific intent to torture must be established beyond a reasonable doubt to have been a willful, deliberate and premeditated intent to inflict extreme and prolonged pain. In this regard, the word willful means intentional. The word deliberate means formed or arrived at as a result of careful thought and weighing the considerations for and against the proposed course of action. The word premeditated means considered beforehand.

(*Ibid.*)

Extreme Pain by Victim—Only Required Before June 6, 1990

Prior to June 6, 1990, Penal Code section 190.2(a)(18), stated:

> The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

Although the Supreme Court has never required proof of subjective suffering by the victim, the court did hold that infliction of extreme physical pain on a live victim was required by the torture murder special circumstance:

> [W]e do not believe that proof of the infliction of extreme physical pain was intended to encompass or necessarily encompasses proof of the subjective experience of the victim. To inflict commonly means to cause to suffer. [. . .]
>
> Proof of a murder committed under the torture-murder special circumstance therefore requires proof of first degree murder, (§ 190.2, subd. (a)), proof the defendant intended to kill and to torture the victim (§ 190.2, subd. (a)(18)), and the infliction of an extremely painful act upon a living victim.

(*People v. Davenport* (1985) 41 Cal.3d 247, 271; *see also People v. Pensinger* (1991) 52 Cal.3d 1210, 1255.)

However, the statute was amended by Proposition 115:

> Proposition 115, passed by the California electorate on June 6, 1990, amended section 190.2, subdivision (a)(18) (torture special circumstance), to delete the requirement of proof that a defendant inflicted *extreme* physical pain on the victim.

(*People v. Crittenden* (1994) 9 Cal.4th 83, 140 n.14 [emphasis in original].)

First degree murder by means of torture does not require that the victim experience extreme physical pain. (*People v. Wiley* (1976) 18 Cal.3d 162, 173.) Following the Proposition 115 amendment, the special circumstance and first degree murder by torture are now equivalent in this regard.

Causation Not Required

> Section 190.2, subdivision (a)(18), provides for this special circumstance where "[t]he murder was intentional *and involved the infliction of torture*." (Italics added.) Unlike section 189, which defines the crime of first degree torture murder as murder

> "perpetrated by means of ... torture," thereby positing the requirement of a causal relationship between the torturous act and death section 190.2, subdivision (a)(18), does not by its terms require such a causal relationship. [. . .] We conclude the prosecution was not required to prove that the acts of torture inflicted upon William were the cause of his death. Therefore, we also reject defendant's related contention that the special circumstance instruction on torture improperly failed to require that there be a causal relationship between the torture and the victim's death.

(*People v. Crittenden* (1994) 9 Cal.4th 83, 141-142 [emphasis in original]; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1161.)

Nexus Between Torture and Murder

Penal Code section 190.2(a)(18) applies to a murder that "involved the infliction of torture." The Supreme Court has not explained what type of nexus this requires though it has recognized that the issue may present in some cases:

> We are unswayed by defendant's assertion that the instructional reference to "murder involving the infliction of torture" is problematic because the word "involving" is too vague and does not necessarily imply that the person tortured be the person killed or that there be some proximity in time or space between the murder and torture. While these points might have merit under a different set of facts, they do not aid defendant's position in this case.

(*People v. Barnett* (1998) 17 Cal.4th 1044, 1161; see also *People v. Bemore* (2000) 22 Cal.4th 809, 843.)

The instruction is written to specify that the torture was committed on the person ultimately murdered. However, no temporal component has been added.

Torture–Murder Compared with Special Circumstance

First degree murder by torture requires a causal link between the murder and the torture which is not required for the special circumstance. (*People v. Proctor* (1993) 4 Cal.4th 499, 530–531.) The torture murder special circumstance, on the other hand, requires the specific intent to kill, unlike first degree murder by torture which may be based on implied malice. (*People v. Davenport* (1985) 41 Cal.3d 247, 271.)

734SC. Special Circumstances: Murder by Poison, Pen. Code, § 190.2(a)(19)

The defendant is charged with the special circumstance of murder by poison.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intentionally killed** _____ <*insert name[s] or description[s] of decedent[s]*>**.**

AND

2. **The defendant killed** _____ <*insert name[s] or description[s] of decedent[s]*> **by the administration of poison.**

[*Poison* is a substance, applied externally to the body or introduced into the body, that kills by its own inherent qualities.]

[_____ <*insert name of substance*> **is a poison.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

Give the bracketed definition of poison if there is a dispute over whether the substance is a poison. Give the bracketed paragraph stating that the substance is a poison if the parties agree that the substance is a poison.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(19).
Special Circumstance Is Constitutional ▸ *People v. Catlin* (2001) 26 Cal.4th 81, 159.
Poison Defined ▸ *People v. Van Deleer* (1878) 53 Cal. 147, 149.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Punishment, § 446.

STAFF NOTES

Pen. Code, § 190.2(a), in relevant part:

> (19) The defendant intentionally killed the victim by the administration of poison.

Murder by Poison and Special Circumstance Compared

> The special circumstance allegation, unlike the definition of first degree murder by poison, requires proof that the defendant intentionally killed the victim. For the purpose of a first degree murder conviction based upon an unlawful killing by means of poison, proof of implied malice would suffice, as we have discussed above.

(*People v. Catlin* (2001) 26 Cal.4th 81, 159.)

Definition of Poison

> A *poison* is defined by Wharton & Stille, Med. Juris. sec. 493, as "a substance having an inherent deleterious property, which renders it, when taken into the system, capable of destroying life." A definition stated in 2 Beck's Med. Juris., with approval, is as follows: "A poison is any substance which, when applied to the body externally, or in any way introduced into the system, without acting mechanically, but by its own inherent qualities, is capable of destroying life."

(*People v. Van Deleer* (1878) 53 Cal. 147, 149.)

Previously, Business and Professional Code section 4160 defined the meaning of poison in terms of specific substances. (See *People v. Barben* (1979) 88 Cal.App.3d 215, 217.) Currently, Business and Professional Code section 4240 states:

> (c) "Poison" as used in this chapter refers to a category of hazardous substances defined in Section 108125 of the Health and Safety Code. The board may by regulation make the category more specific.

Health and Safety Code section 108125 states:

> The term "hazardous substance" means:
>
> (a) Any substance or mixture of substances that (1) is toxic, (2) is corrosive, (3) is an irritant, (4) is a strong sensitizer, (5) is flammable or combustible, or (6) generates pressure through decomposition, heat, or other means; if the substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.
>
> (b) Any substances that the department by regulation finds pursuant to the provisions of Section 108320 meet the requirements of subdivision (a) of this section.
>
> (c) Any radioactive substance, if, with respect to the substance as used in a particular class of article or as packaged, the department determines by regulation that the substance is sufficiently hazardous to require labeling in accordance with this chapter in order to protect the public health.
>
> (d) Any toy or other article intended for use by children that the department determines, by regulation, pursuant to the provisions of Section 108320, presents an electrical, mechanical, or thermal hazard.

This definition is too broad to be useful for explaining “poison” as used in the special circumstance.

735SC. Special Circumstances: Discharge From Vehicle, Pen. Code, § 190.2(a)(21)

The defendant is charged with the special circumstance of committing murder by shooting a firearm from a motor vehicle.

To prove that this special circumstance is true, the People must prove that:

1. **(The defendant/_____** *<insert name or description of principal if not defendant>***) shot a firearm from a motor vehicle, killing _____** *<insert name[s] or description[s] of decedent[s]>***.**

2. **(The defendant/_____** *<insert name or description of principal if not defendant>***) intentionally shot at a person who was outside the vehicle [occupied by (the defendant/_____** *<insert name or description of principal if not defendant>***).**

AND

3. **At the time of the shooting, the defendant intended to kill.**

A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion.

A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ *<insert other type of motor vehicle>***).**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(21).
Motor Vehicle Defined ▸ Veh. Code, § 415.

Special Circumstance Is Constitutional ‣ *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 172.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 447.

STAFF NOTES

Pen. Code § 190.2(a), in relevant part:

> (21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.

Vehicle Code §415:

> (a) A "motor vehicle" is a vehicle that is self-propelled.
>
> (b) "Motor vehicle" does not include a self-propelled wheelchair, invalid tricycle, or motorized quadricycle when operated by a person who, by reason of physical disability, is otherwise unable to move about as a pedestrian.

Accomplice Liability

As with the Task Force Instructions for first and second degree murder by discharge from a vehicle, this instruction has been drafted to allow for accomplice liability where the defendant did not personally fire the weapon. (*See* Task Force Instructions 721, Murder: Degrees and 724, Second Degree Murder: Discharge from Vehicle.) The special circumstance does not present the same difficulties with regard to this issue as do the first and second degree murder statutes. Unlike the first and second degree murder by drive-by statutes, the special circumstance statute explicitly requires intent to kill on the part of an aider and abettor. (Pen. Code § 190.2(c); *see* Task Force Instruction 702SC, Special Circumstances: Intent Requirement for Accomplice Post June 5, 1990—Other Than Felony Murder.) Thus, under the special circumstance statute, an accomplice who did not actually shoot the weapon would only be liable if he or she intended to kill, a consistent structure with all of the special circumstances. The first and second degree drive-by murder statutes, on the other hand, are drafted in such a manner that the use of the gun and the intent requirement are linked. (*See* Pen. Code §§ 189, 190(d).) Thus, in those cases, reading the statutes to permit accomplice liability based on someone else shooting the firearm would also permit liability based on the principal's state of mind (intent to kill for first degree and intent to inflict GBI for second degree). (*See* Staff Notes following Instruction 724, Second Degree Murder: Discharge from Vehicle.)

But review is still pending in *People v. Chavez* (2002) 123 Cal.Rptr.2d 576

[review granted and depublished by *People v. Chavez* (Nov. 13, 2002) 127 Cal.Rptr.2d 328, S109918]. One of the issues presented in *Chavez, supra*, is whether the court erred in failing to instruct that each defendant must intend to kill under the special circumstance of § 190.2(a)(21).

Motor Vehicle Defined

The definition of motor vehicle in this instruction is copied from Instruction 891, Shooting at Inhabited House or Occupied Vehicle, which is adapted from the definition of vehicle in Instruction 1316, Unlawful Taking or Driving of Vehicle.

736SC. Special Circumstances: Killing by Street Gang Member, Pen. Code, § 190.2(a)(22)

The defendant is charged with the special circumstance of committing murder while an active participant in a criminal street gang.

To prove that this special circumstance is true, the People must prove that:

1. **The defendant intentionally killed** _____ *<insert name[s] or description[s] of decedent[s]>***.**

2. **At the time of the killing, the defendant was an active participant in a criminal street gang.**

AND

3. **The murder was carried out to further the activities of the criminal street gang.**

Active participation **means involvement with a criminal street gang in a way that is more than passive or in name only.**

[The People do not need to prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang, or that (he/she) was an actual member of the gang.]

A *criminal street gang* is any ongoing organization, association, or group of three or more persons:

1. **That has a common name or common identifying sign or symbol.**

2. **That has, as one [or more] of its chief activities, the commission of** _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)>***.**

AND

3. **Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.**

A *pattern of criminal gang activity,* as used here, means:

1. **The (commission of[,]/ [or] attempted commission of[,]/ [or] conspiracy to commit[,]/ [or] solicitation to commit[,]/ [or] conviction of[,]/ [or] (Having/having) a juvenile petition sustained for commission of) [any combination of] two or more of the following crimes: _____** *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)>***.**

2. **At least one of those crimes was committed after September 26, 1988.**

3. **The most recent crime occurred within three years of one of the earlier crimes.**

AND

4. **The crimes were committed on separate occasions, or by two or more persons.**

[You cannot find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you do not all need to agree on which crimes were committed.]

<Repeat the following paragraph as necessary for each felony alleged to be committed by defendant gang member[s].>

An active participant in gang activity committed _____ *<insert felony>* **if:**

<INSERT ELEMENTS OF FELONY, SUBSTITUTING "ACTIVE GANG PARTICIPANT" FOR "DEFENDANT.">

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.) The effective date of this special circumstance was March 8, 2000.

On request, give the first bracketed paragraph beginning, "The People do not need to prove that the defendant devoted all or a substantial part of" if there is no evidence that the defendant was a member of the gang or devoted a substantial amount of time to the gang. (See Pen. Code, § 186.22(i).)

In element 1 of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times. (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient].) Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank.

At least one of the crimes alleged to be part of a pattern of criminal gang activity must have occurred after "the effective date" of the Street Terrorism Enforcement and Prevention Act, September 26, 1988. (*People v. Gardeley* (1996) 14 Cal.4th 605, 616, 625 [referring to Sept. 26, 1988, as the effective date].)

Related Instructions
Instruction 540, Participation in Criminal Street Gang.

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(22).
Active Participation Defined ▸ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747.
Criminal Street Gang Defined ▸ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465.
Pattern of Criminal Gang Activity Defined ▸ Pen. Code, § 186.22(e); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003.
Felonious Criminal Conduct Defined ▸ *People v. Green* (1991) 227 Cal.App.3d 692, 704.
Separate Intent From Underlying Felony ▸ *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467–1468.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 443.

RELATED ISSUES

Predicate Offenses

A "pattern of criminal gang activity" requires two or more "predicate offenses" during a statutory time period. The charged crime may serve as a predicate offense (*People v. Gardeley* (1996) 14 Cal.4th 605, 624–625), as can "another offense committed on the same occasion by a fellow gang member." (*People v. Loeun* (1997) 17 Cal.4th 1, 9–10; *see also In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [two incidents (each with the same perpetrator), or single incident with multiple participants committing one or more specified offenses, are sufficient]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.) However, convictions of a perpetrator and an aider and abettor for a single crime establish only one predicate offense (*People v. Zermeno* (1999) 21 Cal.4th 927, 931–932), and "[c]rimes occurring *after* the charged offense cannot serve as predicate offenses to prove a pattern of criminal gang activity." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1458, fn. 4 [original italics].)

Unanimity

The "continuous-course-of-conduct exception" applies to the "pattern of criminal gang activity" element of Penal Code section 186.22(a). Thus, the jury is not required to unanimously agree on which two or more crimes constitute a pattern of criminal activity. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1527–1528.)

STAFF NOTES

Pen. Code § 190.2(a), in relevant part:

> (22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.

Penal Code section 186.22(f) provides:

> (f) As used in this chapter, "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Source of Instruction
This instruction is based on Task Force Instruction 540, Participation in Criminal Street Gang. The following Notes are taken from that instruction.

Primary Activities
"Primary activities" is discussed in *People v. Sengpadychith* (2001) 26 Cal.2d 316, 323 [original italics]:

> The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group's "chief" or "principal' occupations." [Citation omitted.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. [. . .] Sufficient proof of [a] gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statutes. Also sufficient might be expert testimony [. . ..]

Active Participation in Criminal Street Gang
Penal Code section 186.22(i) states what is *not* necessary for active participation in a criminal street gang:

(i) In order to secure a conviction, or sustain a juvenile petition, pursuant to subdivision (a), it is not necessary for the prosecution to prove that the person devotes all, or a substantial part of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

Proposition 21 (approved March 7, 2000), section 35, stated:

In [. . .] adding subdivision (i) to Section 186.22 of the Penal Code, it is the intent of the people to reaffirm the reasoning contained in footnote 4 of *In re Lincoln J.*, 223 Cal.App.3d 322 (1990) and to disapprove of the reasoning contained in *People v. Green*, 227 Cal.App.3d [692] (1991) (holding that proof that 'the person must devote all, or a substantial part of his or her efforts to the criminal street gang; is necessary in order to secure a conviction under subdivision (a) [. . ..]

Footnote 4 of *In re Lincoln J.* (1990) 223 Cal.App.3d 322, 330 states:

[I]t is clear that no evidence was introduced to show that defendant was a member of BTR at the time of the charged offense [. . ..] Membership in a criminal street gang, however, is not an element of the offense of active participation in a criminal street gang (§ 186.22(a)); "[a]ny person who actively participates in any criminal street gang [. . .]" can commit that offense regardless of whether that person is a "member" of such gang.

The court in *People v. Castenada* (2000) 23 Cal.4th 743, 748, also held that *Green* erred:

In a footnote, the [*Scales*] high court mentioned this part of the trial court's jury instruction: " 'In determining whether he was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted *all, or a substantial part, of his time and efforts* to the Party.'" [Citation omitted.] Relying on the italicized language, the Court of Appeal in *Green* construed section 186.22(a)'s phrase "[a]ny person who actively participates in any criminal street gang" as meaning a person who devotes "all, or a substantial part, of his time and efforts to the criminal street gang." [Citation omitted.] *Green* erred in concluding that [. . .] *Scales* mandated this construction.

Castenada, supra, 23 Cal.4th at p. 747, defined active participation:

> The usual and ordinary meaning of "actively" is "being in a state of action; not passive or quiescent" [citation omitted], "characterized by action rather than contemplation or speculation" [citation omitted]. The usual and ordinary meaning of "participates" is "to take part in something (as an enterprise or activity)." [Citation omitted.] In summary, one "actively participates" in some enterprise or activity by taking part in it in a manner that is not passive. Thus, giving these words their usual and ordinary meaning, we construe the statutory language "actively participates in any criminal street gang" (§ 186.22(a)) as meaning involvement with a criminal street gang that is more than nominal or passive.

Pattern of Criminal Gang Activity

Penal Code section 186.22(e) provides:

> (e) As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:
>
> (1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.
>
> (2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8 of Part 1.
>
> (3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1.
>
> (4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code.
>
> (5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.
>
> (6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034.
>
> (7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.

(8) The intimidation of witnesses and victims, as defined in Section 136.1.
(9) Grand theft, as defined in subdivision (a) or (c) of Section 487.
(10) Grand theft of any firearm, vehicle, trailer, or vessel.
(11) Burglary, as defined in Section 459.
(12) Rape, as defined in Section 261.
(13) Looting, as defined in Section 463.
(14) Money laundering, as defined in Section 186.10.
(15) Kidnapping, as defined in Section 207.
(16) Mayhem, as defined in Section 203.
(17) Aggravated mayhem, as defined in Section 205.
(18) Torture, as defined in Section 206.
(19) Felony extortion, as defined in Sections 518 and 520.
(20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594.
(21) Carjacking, as defined in Section 215.
(22) The sale, delivery, or transfer of a firearm, as defined in Section 12072.
(23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101.
(24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.
(25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.

The "effective date of this chapter" (see opening paragraph of § 186.22(e) above) is September 26, 1988. *People v. Gardeley* (1996) 14 Cal.4th 605, 616, 625 [referring to Sept. 26, 1988 without citation of authority].)

737SC. Special Circumstances: Murder of Transportation Worker, Pen. Code, § 190.25

The defendant is charged with the special circumstance of murdering (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____ *<insert name of vehicle or transportation entity specified in Pen. Code, § 190.25>***.**

To prove that this special circumstance is true, the People must prove that:

1. **_____** *<insert name or description of decedent>* **was (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____** *<insert name of vehicle or transportation entity specified in Pen. Code, § 190.25>* **performing (his/her) duties.**

2. **(The defendant/_____** *<insert name or description of principal if not defendant>***) intentionally killed _____** *<insert name or description of decedent>***.**

3. **When _____** *<insert name or description of decedent>* **was killed, the defendant knew, or reasonably should have known, that _____** *<insert name or description of decedent>* **was (a/an) (operator/driver/station agent/ticket agent) of (a/an) _____** *<insert name of vehicle or transportation entity specified in Pen. Code, § 190.25>* **[and that (he/she) was performing (his/her) duties].**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.)

This special circumstance alone does not provide for the death penalty. (*People v. Marks* (2003) 31 Cal.4th 197, 234.) However, if the defendant is also convicted of a special circumstances listed in Penal Code section 190.2(a), the defendant may be eligible for the death penalty. (*Ibid*.; see also Pen. Code, § 190.25(c).)

If accomplice liability is at issue, give Instruction 702SC, Special Circumstances: Intent Requirement for Accomplice, After June 5, 1990—Other Than Felony Murder. (See Pen. Code, § 190.25(b).)

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.25.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 459.

STAFF NOTES

Pen. Code § 190.2(a), in relevant part:

> (a) The penalty for a defendant found guilty of murder in the first degree shall be confinement in state prison for a term of life without the possibility of parole in any case in which any of the following special circumstances has been charged and specially found under Section 190.4, to be true: the victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or the victim was a station agent or ticket agent for the entity providing such transportation, who, while engaged in the course of the performance of his or her duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was the operator or driver of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land, including a vehicle operated on stationary rails or on a track or rail suspended in the air, used for the transportation of persons for hire, or was a station agent or ticket agent for the entity providing such transportation, engaged in the performance of his or her duties.
>
> (b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.
>
> (c) Nothing in this section shall be construed to prohibit the charging or finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

740SC. Special Circumstances: Prior Murder Conviction, Pen. Code, § 190.2(a)(2)—Bifurcated Trial on Prior Murder, Pen. Code, § 190.1(a) & (b)

The defendant is charged with the special circumstance of having been convicted previously of murder. You must now decide if the People have proved that this special circumstance is true.

To prove that this special circumstance is true, the People must prove that the defendant was convicted previously of murder in the first or second degree.

[A conviction of _____ <*insert name of offense from other state*> **is the same as a conviction for (first/ [or] second) degree murder.]**

Remember, the defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a special circumstance beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved this special circumstance beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received in this proceeding. If you have a reasonable doubt whether the People have proved this special circumstance is true, you must find that it has not been proved true.

In order for you to return a finding that this special circumstance is true or not, all 12 of you must agree.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the elements of the special circumstance. (See *People v. Williams* (1997) 16 Cal.4th 635, 689.) The court must bifurcate trial on this special circumstance from trial on the other charges unless the defendant specifically waives bifurcation. (Pen. Code, § 190.2(b); *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1302; *People v. Farnam* (2002) 28 Cal.4th 107, 146.)

Following this instruction, the court **must give** Instruction 140, Predeliberation Instructions, explaining how to proceed in deliberations.

If the defendant has waived bifurcation, the court should give paragraphs one and two. The court may also give paragraph three if appropriate. The remainder of the instruction should not be given.

"The jury sitting as trier of fact must determine 'the truth of' the prior conviction—i.e., the fact that defendant was previously convicted of first or second degree murder." (*Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1301.) The court must determine the validity of the prior conviction. (*Id.* at p. 1302.) For an out-of-state prior, the court must determine whether the elements of the offense for which the defendant was convicted satisfy the elements of first or second degree murder in California. (*People v. Martinez* (2003) 31 Cal.4th 673, 684–686; *People v. Andrews* (1989) 49 Cal.3d 200, 223.)

AUTHORITY

Special Circumstance ▸ Pen. Code, § 190.2(a)(2).
Bifurcated Trial ▸ Pen. Code, § 190.1(a) & (b).
Fact of Conviction Determined by Jury ▸ *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1301.
Validity of Conviction Determined by Court ▸ *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1302.
Out-of-State Priors ▸ *People v. Martinez* (2003) 31 Cal.4th 673, 684–686; *People v. Trevino* (2001) 26 Cal.4th 237, 242; *People v. Andrews* (1989) 49 Cal.3d 200, 223.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 439.

RELATED ISSUES

Order of Conviction Relevant, Not Order of Murders
"The unambiguous language and purpose of section 190.2(a)(2) thus require that a person such as defendant, already convicted of murder in a prior proceeding, must be considered eligible for the death penalty if convicted of first degree murder in a subsequent trial. The order of the commission of the homicides is immaterial." (*People v. Hendricks* (1987) 43 Cal.3d 584, 596; *People v. Gurule* (2002) 28 Cal.4th 557, 636.)

Intent to Kill Not Required

"Defendant also contends that section 190.2(a)(2) requires a finding of intent to kill. Plainly, the provision does not expressly require such a finding." (*People v. Hendricks* (1987) 43 Cal.3d 584, 596; *People v. Gurule* (2002) 28 Cal.4th 557, 633.)

STAFF NOTES

Pen. Code § 190.2(a), in relevant part:

> (2) The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.

Pen. Code 190.1, in relevant part:

> (a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.
>
> (b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

Out of State Prior—Based on Elements of Offense

> Defendant is attempting to characterize the words "would be punishable" as if they were synonymous with the term "would be punished." "Punishable" has been defined as "[deserving] of or capable or liable to punishment; capable of being punished by law or right." (Black's Law Dict. (5th ed. 1979) p. 1110, col. 1.) The word does not denote certainty of punishment, but only the capacity therefor. [. . .]
>
> [I]t appears the intent was to limit the use of foreign convictions to those which include all the elements of the offense of murder in California, and defendant has failed to show otherwise.

(*People v. Andrews* (1989) 49 Cal.3d 200, 222-223.)

> We therefore conclude that under section 190.2, subdivision (a)(2), the determination whether a conviction in another jurisdiction qualifies under California's prior-murder special circumstance depends entirely upon whether the offense committed in the other jurisdiction involved conduct that satisfies all the elements of first or second degree murder under California law.

(*People v. Trevino* (2001) 26 Cal.4th 237, 242.)

> Under *Andrews*, the relevant inquiry is whether the offense of which the defendant was convicted in Texas *includes the elements of first or second degree murder in California* such that the Texas offense was one which had the capacity for punishment as first or second degree murder.

(*People v. Martinez* (2003) DJDAR 9283, 9284 [quotation marks omitted; emphasis in original].)

745SC. Second Degree Murder
With Prior Prison for Murder, Pen. Code, § 190.05

The defendant is charged with the additional allegation of having previously served a prison term for murder. You must now decide if the People have proved this additional allegation.

To prove that this additional allegation is true, the People must prove that:

1. **The defendant was convicted previously of murder in the first or second degree.**

AND

2. **The defendant served time in prison as a result of that conviction.**

[A conviction of _____ *<insert name of offense from other state>* **is the same as a conviction for (first/ [or] second) degree murder.]**

[For the purpose of this allegation, serving time i n _____ *<insert name of institution from Pen. Code, § 190.05>* **qualifies as serving time in prison.]**

[Remember, the defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of the additional allegation beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved this additional allegation beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received in this proceeding. If you have a reasonable doubt whether the People have proved this additional allegation, you must find that it has not been proved.

In order for you to return a finding that this additional allegation has been proved or not, all 12 of you must agree.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of the additional allegation. (See Pen. Code, § 190.05(c) [must submit special allegation to jury].)

Penal Code section 190.05 provides for possible sentences of either life without parole or 15 years to life for a defendant convicted of second degree murder who has served a prior prison term for first or second degree murder. (Pen. Code, § 190.05(a).) The statute requires the jury to find the fact of the conviction true beyond a reasonable doubt. (Pen. Code, § 190.05(c), (d).) The statute does not require that trial on the prior conviction be bifurcated from trial on the underlying charge. If the court does use a bifurcated trial, give the last three bracketed paragraphs and follow this instruction with Instruction 140, Predeliberation Instructions. (See *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1579.)

If the prior is found true, the court must then proceed with a separate penalty phase in which the jury determines which of the two possible sentences is appropriate. (Pen. Code, § 190.05(e); *People v. Gutierrez, supra,* 23 Cal.App.4th at p. 1579.) The court should then modify the death penalty phase instructions for use in this penalty phase trial. The factors for the jury to consider under Penal Code section 190.05(e) are identical to the factors to be considered in a death penalty trial. Thus, the court needs to change only the penalties that the jury must choose between.

AUTHORITY

Second Degree Murder With Prior Prison for Murder ▸ Pen. Code, § 190.05.
Right to Jury Trail on Prior Conviction ▸ Pen. Code, § 190.05(c).
Reasonable Doubt Standard ▸ Pen. Code, § 190.05(d).
Separate Penalty Phase ▸ Pen. Code, § 190.05(e).

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Against the Person, § 164.

STAFF NOTES

Pen. Code § 190.05, in relevant part:

(a) The penalty for a defendant found guilty of murder in the second degree, who has served a prior prison term for murder in the first or second degree, shall be confinement in the state prison for a term of life without the possibility of parole or confinement in the state prison for a term of 15 years to life. For purposes of this section, a prior prison term for murder of the first or second degree is that time period in which a defendant has spent actually incarcerated for his or her offense prior to release on parole.

(b) A prior prison term for murder for purposes of this section includes either of the following:

(1) A prison term served in any state prison or federal penal institution, including confinement in a hospital or other institution or facility credited as service of prison time in the jurisdiction of confinement, as punishment for the commission of an offense which includes all of the elements of murder in the first or second degree as defined under California law.

(2) Incarceration at a facility operated by the Youth Authority for murder of the first or second degree when the person was subject to the custody, control, and discipline of the Director of Corrections.

(c) The fact of a prior prison term for murder in the first or second degree shall be alleged in the accusatory pleading, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(d) In case of a reasonable doubt as to whether the defendant served a prior prison term for murder in the first or second degree, the defendant is entitled to a finding that the allegation is not true.

(e) If the trier of fact finds that the defendant has served a prior prison term for murder in the first or second degree, there shall be a separate penalty hearing before the same trier of fact, except as provided in subdivision (f).

(f) If the defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty or nolo contendere, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If the new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in the state prison for a term of 15 years to life.

(g) Evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(h) In the proceeding on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition, and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and

acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or the prior prison term for murder of the first or second degree which subjects a defendant to the punishment of life without the possibility of parole, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(1) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of the prior prison term for murder.

(2) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(3) The presence or absence of any prior felony conviction.

(4) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(5) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(6) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his or her conduct.

(7) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(8) Whether or not at the time of the offense the ability of the defendant to appreciate the criminality of his or her conduct or to

conform his or her conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication.

(9) The age of the defendant at the time of the crime.

(10) Whether or not the defendant was an accomplice to the offense and his or her participation in the commission of the offense was relatively minor.

(11) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of life without the possibility of parole if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement in the state prison for 15 years to life.

(i) Nothing in this section shall be construed to prohibit the charging of finding of any special circumstance pursuant to Sections 190.1, 190.2, 190.3, 190.4, and 190.5.